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From "Lamentation and Liturgy to Litigation": The Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits in American Courts

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FROM “LAMENTATION AND LITURGY TO LITIGATION”: THE HOLOCAUST-ERA RESTITUTION MOVEMENT AS A MODEL FOR BRINGING ARMENIAN GENOCIDE-ERA RESTITUTION SUITS IN AMERICAN COURTS

MICHAEL J. BAZYLER*

The numerous Holocaust restitution civil lawsuits that began to be filed in the late 1990s and still continue today have yielded over \$8 billion in payouts to still-living Holocaust survivors and the heirs of Holocaust victims. The precedent created by the Holocaust restitution movement now makes it possible for suits stemming from the material losses during the Armenian Genocide likewise to be considered by American courts. The Armenian Genocide-era restitution cases filed to date have targeted entities that, while allegedly profiting from the Armenian Genocide, nevertheless were tangential actors to the genocide. The next step in the burgeoning Armenian Genocide-era restitution movement would be the filing of suits against the Republic of Turkey and its state-owned enterprises that directly profited from the genocide. Until recently, suits against these foreign sovereign defendants would have been barred by the Foreign Sovereign Immunities Act (FSIA). However, recent decisions by the United States Supreme Court and the Ninth Circuit interpreting FSIA in relation to Holocaust restitution have now made possible, for the first time in history, actions against the Republic of Turkey and its state-owned

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entities for acts committed during the Armenian Genocide. This article provides a blueprint for such suits.

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For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from picketing and going to church every April 24 [the Armenian Day of Remembrance] and mourning to taking legal action.

....

Holocaust victims' heirs showed me the way.¹

I. INTRODUCTION

A recurring theme in writings about the Armenian Genocide is the focus on efforts to obtain recognition of the genocide from the Republic of Turkey.² One also finds, in some instances, discussion about using international and multinational organizations like the United Nations and the European Union to seek some form of reparation for the few living survivors and the much larger group of descendants of the mass murder of Armenians committed in Ottoman Turkey between 1915 and 1923.³ This Article takes a different approach by focusing on the role of United States domestic law in dealing with the Armenian Genocide. It specifically examines the use of American-style civil litigation as an

1. Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. TIMES, Apr. 27, 2001, at E1 (internal quotation marks omitted) (quoting Armenian-American attorney Vartkes Yeghiayan, who represented plaintiffs in Armenian Genocide-era restitution suits).

2. Roger W. Smith, *The Armenian Genocide: Memory, Politics, and the Future*, in THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS 1, 7 (Richard G. Hovannisian ed., 1992) (stating that "Turkey will not acknowledge the genocide, but public recognition of it by other countries may go some way toward healing the rage that destroys."); see also PHILIP HERBST, TALKING TERRORISM: A DICTIONARY OF LOADED LANGUAGE OF POLITICAL VIOLENCE 77 (2003) ("Turkey does not recognize the 1915 massacre of Armenians as genocide," but instead refers to the genocide as "a tragic civil war initiated by Armenian nationalists").

3. See, e.g., SEDAT LAÇINER ET AL., EUROPEAN UNION WITH TURKEY: THE POSSIBLE IMPACT OF TURKEY'S MEMBERSHIP ON THE EUROPEAN UNION 66–70 (2005) (discussing how Turkey's non-recognition of the Armenian Genocide presents obstacles to Turkish entry into the European Union); Robert Melson, *Provocation or Nationalism: A Critical Inquiry into the Armenian Genocide of 1915*, in THE ARMENIAN GENOCIDE IN PERSPECTIVE 61, 81 n.1 (Richard G. Hovannisian ed., 1986). Further, "[a]n insightful discussion of the concept and of the efforts of the UN to apply the Genocide Convention" focuses on the idea that the terms genocide and holocaust are used too casually. Melson, *supra*, at 81 n.1 (citing LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1981); and LUCY S. DAWIDOWICZ, THE HOLOCAUST AND THE HISTORIANS (1981)). However, some scholars have suggested that the "term holocaust be reserved for instances of extermination" and that "the Armenian [G]enocide of 1915 is one such instance" and, thus, an instance appropriate for UN governance. *Id.* (referring to Yehuda Bauer, Essay, *The Place of the Holocaust in Contemporary History*, in STUDIES IN CONTEMPORARY JEWRY 201–04 (Jonathan Frankel ed., 1984)).

instrument for bringing accountability to those public and private entities that are still profiting today from the Armenian Genocide.

The domestic courts of the United States have, so far, been the only courts ready to recognize civil suits for monetary damages as instruments for remedial action in response to genocide and other massive human rights abuses. The most dramatic use of civil litigation for this purpose centers on the genocide of the Jews during World War II at the hands of Nazi perpetrators and their accomplices, the event known as the Holocaust.⁴ The Holocaust restitution movement, launched in the late 1990s⁵ in American courts against European corporations and governments for their wrongful wartime activities,⁶

4. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 795 (2002). Neuborne writes,

Aided by diplomatic initiatives by Germany and the United States, and by the vigorous support of many political figures and community organizations, Holocaust-related litigation in American courts against Swiss, German, Austrian, and French corporations over the past six years has resulted in the assemblage of a vast pool of assets valued in excess of \$8 billion for distribution to Holocaust victims around the world.

Id.; see also Graham O'Donoghue, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1124–25 (2006) (“The litigation over Nazi-era claims that ensued in the years following World War II, and particularly in the late 1990s, was directed, in part, at returning that which was wrongfully taken to its rightful owners.”).

5. See *infra* note 6. See generally MICHAEL MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST RESTITUTION CAMPAIGN OF THE 1990S* (2009).

6. See, e.g., MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2003) (reviewing the various lawsuits against Swiss and other European banks, German companies, European insurance companies, and museums worldwide arising from looting of Jewish property during World War II); STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 77–78 (2003). See generally Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 50 (Michael J. Bazyler & Roger P. Alford eds., 2006) (discussing generally the litigation and history of the Holocaust restitution movement from the perspective of its most important actors and observer-scholars).

The Holocaust restitution litigation began in 1996 with suits against Swiss banks for failure to return asset deposits of Jews with the banks during the Hitler era and for trading with Nazi Germany in looted assets, including gold stolen by the Nazis. EIZENSTAT, *supra*, at 78. It then proceeded with suits against European insurance companies for failure to honor Holocaust-era insurance policies. *Id.* at 266–68. Holocaust survivors then filed suits against German companies for profiting from slave labor by Nazi victims and related activities. *Id.* at 77. French and Austrian banks were also sued for persecuting their Jewish customers. *Id.* at 303–08, 319–20. Finally, museums, galleries, and private collectors were sued for the return of art looted by the Nazis from Jewish families that came into the hands of these persons and

yielded over \$8 billion in payouts as compensation for the monetary losses and other injuries suffered by Jews during World War II.⁷

This Article proceeds with Part II, which will discuss the successful Holocaust restitution litigation. Part III will analyze the Armenian lawsuits filed to date and then set out how the Holocaust restitution litigation has been used as a model for the Armenian suits. Finally, Part IV will look to the future and discuss the viability of filing suits against the Republic of Turkey, the nation-state itself, and Turkish state-owned enterprises doing business in the United States based on the precedents created by the Holocaust-era restitution suits and the movement established by the settled and ongoing Armenian restitution suits.

II. THE HOLOCAUST RESTITUTION LITIGATION

A. “As a moth is drawn to light”: Why American Courts?

The fact that American courts for the last decade have dealt with wrongs committed during World War II, “over one-half century after the events took place, is astounding.”⁸ In the history of American litigation, until the filing of the Holocaust-era restitution suits, “no class

entities after the war. *See id.* at 187–204. For general discussions about the theft of Jewish property during the Nazi-era, see GÖTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* (2008); RICHARD Z. CHESNOFF, *PACK OF THIEVES: HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY* (2001); and MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* (2010).

7. *America’s Role in Addressing Outstanding Holocaust Issues: Hearing Before the Subcomm. on Eur. of the H. Comm. on Foreign Affairs*, 110th Cong. 8 (2007) (statement of Hon. J. Christian Kennedy, Special Envoy for Holocaust Issues). Kennedy stated the following:

A combination of court settlements and other U.S.-facilitated agreements resulted in over \$8 billion for Holocaust victims and their heirs from Swiss banks, German companies, Austrian companies, and French banks, as well as several large European insurance companies. Most of these agreements were concluded with the participation of European governments and the U.S. Government.

As of today, nearly all of the \$8 billion from these agreements has been either distributed to survivors and heirs or otherwise obligated for continuing programs to support needy survivors or promote Holocaust education and remembrance.

Id.

8. Michael J. Bazyler, *Litigating the Holocaust*, THE 1939 CLUB, <http://www.1939club.com/1939%20Articles-1.htm> (last visited Nov. 11, 2011) [hereinafter *Litigating the Holocaust*].

of cases [had] ever appeared in which so much time had passed between the wrongful act and the filing of the lawsuit.”⁹

The Holocaust did not occur in the United States, but in Europe, and most Holocaust survivors reside outside of the United States.¹⁰ It is the United States legal system, however, that took the lead in delivering some measure of long-overdue justice to aging Holocaust survivors.¹¹ As with all transnational litigation today, the highly-developed and expansive system of American justice made the United States the best and, in most instances, the only legal forum for the disposition of such claims.¹²

9. Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 11 (2002) [hereinafter *Holocaust Restitution Movement*]; *Litigating the Holocaust*, *supra* note 8. The Holocaust litigation that ensued from the wrongs of the Nazi-era has been pursued in American courts decades after such acts occurred. *Litigating the Holocaust*, *supra*. These cases represent litigation with the longest window between the wrongful act and the pursuit of litigation against such acts. *Id.*

10. Tel Aviv University, *United States of America 2000–1*, THE STEPHEN ROTH INSTITUTE FOR THE STUDY OF CONTEMPORARY ANTISEMITISM AND RACISM, <http://www.tau.ac.il/Anti-Semitism/asw2000-1/usa.htm> (last visited Oct. 14, 2011). The report indicates that “Jews of East European origin make up the majority of American Jewry, while the United States is also home to the largest number of Holocaust Survivors outside of the State of Israel.” *See id.* Amcha provides rehabilitative services to meet the needs of still-living Holocaust survivors. *See About Us/Amcha’s Mission*, AMCHA, <http://www.amcha.org> (last visited Nov. 5, 2011). According to the site, “[a]bout 200,000 Holocaust survivors live in Israel today, many of whom were children during the war.” *Id.*

11. *See* Arthur Oder, Note, *What’s Fair Is Fair? A Comparative Look at Judicial Discretion in Fairness Review of Holocaust Era Class Action Settlement in the United States and Canada*, 17 CARDOZO J. INT’L & COMP. L. 545, 548 (2009). Because of “the seemingly unimaginable victory of the Swiss Banks Settlement, several new Holocaust era class actions began to appear in U.S. courts.” *Id.* The litigation that ensued contributed to the United States taking the lead in Holocaust-related litigation. *Id.*; *United States Practice in International Law*, 2006 DIGEST ch. 8, at 505 (Sally J. Cummins ed.) (describing the American interest in Holocaust-related litigation as “an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes”).

12. Tom McNamara, Special Features of Transnational Litigation in United States Courts Presented to: Russian–American Symposium on Private International Law (June 29, 2004), available at <http://apps.americanbar.org/intlaw/committees/disputes/litigation/Transnationallit.pdf>.

[T]he American judicial system clearly “has many features that make suit in the United States more attractive than in foreign jurisdictions.” The apparent willingness of American courts to entertain foreign-oriented cases has prompted considerable comment in legal and foreign policy circles as well as the mass media both in the United States and abroad. A recent headline from the New York Times crystallizes the common perception: “U.S. Courts Become Arbiters of Global

American courts have a long history of recognizing jurisdiction over defendants where courts of other countries would find jurisdiction to be lacking.¹³ American-style discovery, unknown in Europe, allows the plaintiff's lawyers to better develop the case through requests for production of documents, requests for admission, and depositions of adverse parties and witnesses during the pre-trial process.¹⁴ This is in contrast to the European system of having all evidence available at the outset of litigation.¹⁵ The usual guarantee of jury trials in civil cases, coupled with a culture where juries are accustomed to granting awards in the millions (or even billions) of dollars, both as compensatory and as punitive damages, made the filing of a Holocaust-era lawsuit in the United States more likely to succeed financially.¹⁶ Furthermore, the existence of the concept of a "class action," where representative plaintiffs can file suit not only on their own behalf, but also on behalf of all others similarly situated, creates a more efficient system of filing suits and raises the prospect of large awards against wrongdoers.

American legal culture has also been a key factor. American attorneys are greater risk-takers than their European counterparts. Unlike in most other countries, an American lawyer can take a case on a contingency basis, in which the client does not pay if the case is unsuccessful but must share a percentage of the award if the case

Rights and Wrongs."

Id. (quoting Brief of the Chamber of Commerce of the United States and the Organization for International Investment as Amici Curiae in Support of Petitioner at 5, *Hoffman-Laroche, Ltd. v. Empagran, S.A.*, No. 03-724, 2004 WL 220706 (U.S. Feb. 3, 2004)).

13. See generally Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

14. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 907-12 (4th ed. 2007); see also *Smith Kline & French Labs. v. Bloch*, [1983] W.L.R. 730 (A.C.) at 744 (Eng.). "The broad, party-controlled character of U.S. pretrial discovery contrasts sharply with methods for obtaining evidence in many foreign countries." BORN & RUTLEDGE, *supra*, at 910. Discovery in civil law countries is controlled by the courts rather than the litigants and takes the power away from the plaintiff's attorney in seeking production of evidence. *Id.* at 910-11.

15. BORN & RUTLEDGE, *supra* note 14, at 911-12 (describing that in civil law nations the taking of evidence is a judicial function that seeks to prevent attorneys from fishing-expeditions by keeping evidence available only at the outset of litigation).

16. See *id.* at 3-4 (describing the benefits to plaintiffs in U.S. courts, as "U.S. damage awards tend to be dramatically larger than those in other countries").

succeeds.¹⁷ Moreover, in the United States, a losing party, except in unusual cases, does not pay the attorney fees of the successful litigant.¹⁸ The American system thus creates incentives for both attorneys and plaintiffs alike, allowing victims to bring claims more often. The great British jurist Lord Denning recognized American courts as the most desirable forum for transnational litigation when he wryly observed in an English court opinion as follows: “As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”¹⁹

New York University law professor Burt Neuborne, one of the lead lawyers in the Holocaust restitution suits against the Swiss banks and German industries, in response to the question of why an American court should hear these suits, explained it this way:

Why an American court? Well, why not? Jurisdiction over most of the defendants is not a problem, since very few major corporations elect to pass up the opportunity to do substantial business in the world’s largest market. American procedure is among the most sophisticated in the world, permitting large numbers of similarly situated victims to be represented in class actions, and requiring disclosure of relevant corporate records. In no other legal system is the playing field so truly level between weak and strong.

Finally, American courts are not afraid to enforce the bans on genocide, war crimes and crimes against humanity announced by the Nuremberg tribunals as the core of customary international law. We hope to blend sophisticated American procedure and humanitarian international law to provide victims of the Holocaust with a modicum of legal justice.²⁰

It follows that, based on the jurisdictional expansiveness embraced by the American judicial system and the plaintiff-friendly environment found in America, American courts present the best, and most often the only, forum where suits for historical injustices can be heard.

17. *Id.* at 3.

18. *Id.* See generally Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2001).

19. *Smith Kline*, [1983] W.L.R. at 733.

20. Burt Neuborne, *Making a Case for Victims of the Holocaust*, JEWISH J. (Apr. 22, 1999), <http://www.jewishjournal.com/home/searchview.php?id=3508>.

B. Symbolic Justice

In evaluating the successes of the Holocaust restitution suits, it is important to remember their limitations. First, none of these lawsuits went to trial. All ended with settlements; meaning that the victims of the Holocaust or their heirs filing these suits never got their day in court.

Second, some of these suits were initially dismissed on jurisdictional grounds. In some instances, however, even when the European defendants won, they did not walk away from the negotiating table but continued to negotiate to reach some kind of settlement. Germany and its corporations, for example, realized that they had not only a legal dispute on their hands, but also a political dispute and a significant public relations problem.²¹ A legal victory still would not keep (1) American politicians from pushing for the Germans to make some kind of compensation; and (2) the Holocaust victims and their supporters from reminding the American consumer that the German products they were buying—whether cars, computers, aspirin, or insurance—were from the same companies that were implicated in some of the most horrific crimes committed in human history.²²

Third, and finally, while each of the settlements in totality involved large sums, including some in the billions of dollars, the individual payouts for most survivors and heirs have been small.²³ As an example,

21. See BAZYLER, *supra* note 6, at 74–79.

22. As Turkey and Turkish state-owned and private enterprises expand their commercial presence in the United States, inklings of similar public-awareness campaigns are beginning to appear. For example, in December 2010, state-owned Turkish Airlines announced that it hired basketball star Kobe Bryant as its official spokesperson. In reaction, celebrity Kim Kardashian, who is of Armenian descent, mounted a Twitter campaign seeking for Bryant to dissociate himself from the airline and even recruited her sister Khloe, who is married to Bryant's teammate Lamar Odom, in her efforts. Kardashian's campaign, while bringing additional awareness of the Armenian Genocide to the younger generation of American consumers and celebrity watchers, ultimately did not convince Bryant himself, who continued as the public face of Turkish Airlines under his two-year contract. See, e.g., Benjamin Harvey, *Kobe Bryant's Sponsorship by Turkish Airlines Provokes L.A. Armenians' Ire*, BLOOMBERG (Dec. 15, 2010), <http://www.bloomberg.com/news/2010-12-15/kobe-bryant-s-sponsorship-by-turkish-airlines-provokes-l-a-armenians-ire.html>; Melissa Rohlin, *Kobe Bryant's Deal With Turkish Airlines Has Angered Many Armenian Americans*, L.A. TIMES: LAKERS BLOG (Dec. 16, 2010, 8:49 PM), <http://lakersblog.latimes.com/lakersblog/2010/12/kobe-bryants-deal-with-turkish-airlines-has-sparked-protests.html> (discussing Bryant's deal).

23. Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, COMMENTARY, Sept. 2000, at 25, 29. “Actual payments that the Holocaust claimants will receive are minuscule (whether \$7,500 or \$50,000) compared to the personal and financial losses they suffered. The payments made by the corporate wrongdoers will come nowhere close to disgorging the profits they made from their dealings with the Nazis or participation in the

Holocaust survivors that worked as slaves at Auschwitz for a German company under the most horrific conditions—conditions for which the German Nazis called the “death-through-work program”²⁴—received a one-time payment of approximately \$7500 each.²⁵

At most, we call these payments “symbolic justice.” Much more important than the sums received was the recognition by the perpetrators of the wrongs committed against the victims and an issuance of an apology to those victims. As explained by Eva Kor, an identical twin experimented upon at Auschwitz by the infamous Dr. Mengele, “Even though this is a small amount of money, it is a big help

Holocaust.” *Holocaust Restitution Movement*, *supra* note 9, at 41.

24. 1 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 876, 878 (1946).

The slave labor program was designed to achieve two purposes. The primary purpose was to satisfy the labor requirements of the Nazi war machine by compelling foreign workers, in effect, to make war against their own countries and its allies. The secondary purpose was to destroy or weaken peoples deemed inferior by the Nazi racialists, or deemed potentially hostile by the Nazi planners of world supremacy.

....

The purposes of the slave labor program, namely, the strengthening of the Nazi war machine and the destruction or weakening of peoples deemed inferior, were achieved by the impressment and deportation of millions of persons into Germany for forced labor, by the separation of husbands from their wives and children from their parents, and by the imposition of conditions so inhuman that countless numbers perished.

Id.

25. Transcript of Remarks by Ambassador Stuart E. Eizenstat Before the Austrian Parliament in Commemoration of Ten-Year Anniversary of the Washington Agreement between the United States and Austria (Jan. 19, 2011), *available at* <http://austria.usembassy.gov/eizenstat.html>. As Ambassador Eizenstat remarked:

While the overall amounts seem large (in Austria’s case, including funds from the National Fund and our U.S.–Austrian agreement some \$1 billion; in Germany’s \$5 billion), the actual payments to individuals were small. Slave laborers received a one-time payment of roughly \$7500 and forced laborers \$2500, no more than a symbolic payment. And those whose property in Austria was torn from them have received a tiny fraction of their actual value. And all of these payments came only over fifty years later. Nor did the class action lawyers enrich themselves, as some believe. I assured that in the final settlements, they received only about one percent of the total amount.

Id.; see also *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 15–16 (2000) (discussing some of the concerns of Ambassador Eizenstat).

to those survivors who are in need of assistance. And more importantly, this shows that Germany has recognized what was done to the victims and has not forgotten their suffering.”²⁶ The few remaining Armenian victims of the genocide and their heirs, of course, still await such recognition and symbolic justice from Turkey.

III. USING HOLOCAUST RESTITUTION LITIGATION AS A MODEL FOR SEEKING JUSTICE FOR THE ARMENIAN GENOCIDE

A. *Suing the Tangential Actors: Armenian Insurance Litigation*

Attorney Vartkes Yeghiayan, himself a child of survivors of the Armenian Genocide, initiated the use of American courts to litigate events surrounding the Armenian Genocide. The *Los Angeles Times* explained Yeghiayan’s motivation in filing such suits as follows: “‘For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation,’ from picketing and ‘going to church every April 24 [Armenian Day of Remembrance] and mourning’ to taking legal action.”²⁷ Paying homage to the Holocaust restitution suits as precedent for his actions, Yeghiayan commented, “Holocaust victims’ heirs ‘showed me the way.’”²⁸

By 2008, Yeghiayan and his fellow Southern California attorneys, Brian Kabateck and Mark Geragos, had brought several suits in federal courts in California against various American and European corporate entities for events surrounding the Armenian Genocide.²⁹ Their first suit involved insurance.

26. *Children of Auschwitz Nazi Deadly Lab Experiments Survivors*, CANDLES HOLOCAUST MUSEUM, <http://www.candlesholocaustmuseum.org/index.php?sid=26> (last visited Oct. 12, 2011) (providing background on Eva Kor); *Jewish Victims of Nazi Medical Experiments to Receive Second Symbolic Payment*, CLAIMS CONFERENCE: THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY (Mar. 8, 2005), <http://www.claimscon.org/?url=medex/payment2>.

27. Beyette, *supra* note 1, at E3. The Armenian Day of Remembrance commemorates the arrest and deportation of some 250 Armenian intellectuals of Istanbul on the evening of April 24, 1915.

28. *Id.*

29. See Carol J. Williams, *Armenian Genocide Victims’ Descendants May Sue, Court Rules*, L.A. TIMES (Dec. 11, 2010), <http://articles.latimes.com/2010/dec/11/local/la-me-armenian-genocide-20101211>; Dennis Romero, *Armenian-American Lawyers, Including Mark Geragos, Seek Class-Action Status in Suit Against Turkey*, LAWEEKLY: BLOGS (July 30, 2010, 6:08 AM), http://blogs.laweekly.com/informer/2010/07/armenian-american_turkey.php.

During the Turkish Ottoman Empire, Armenians and other minorities purchased insurance policies from European and American insurance companies, which marketed those policies in the region.³⁰ The majority of such purchasers perished in the Armenian Genocide during and after World War I. Their relatives, some of whom survived the genocide as young children and were now quite elderly, sought payment from the insurers, claiming that the insurance companies never paid the beneficiaries of these policies.³¹ Some even had the original copies of these policies, passed down from generation to generation.³²

Perhaps the best known documentation regarding the theft of Armenian assets by the Ottoman Turks involved the exchange between Henry Morgenthau, American Ambassador to the Ottoman Empire, and Ottoman leader Mehmed Talaat Pasha.³³ During this exchange, Pasha requested that Morgenthau ask American insurance companies to supply the Ottoman government with a list of their Armenian policy holders because the proceeds of the dead Armenians would now escheat to the state.³⁴

In 2000, twelve elderly Armenians, representing a putative class of approximately 10,000 persons of Armenian ancestry, brought the first

30. See, e.g., Elaine Woo, *Martin Marootian Dies at 95; Lead Plaintiff in Suit Over Armenian Genocide Victims' Insurance Policies*, L.A. TIMES (Mar. 12, 2011), <http://articles.latimes.com/2011/mar/12/local/la-me-martin-marootian-20110312>.

31. *Id.*

32. *Id.*

33. HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 339 (1918). The exchange in Morgenthau's diary reads as follows:

One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which these people insured their lives was merely another indication of their thrifty habits.

"I wish," Talaat now said, "that you would get the American life insurance companies to send us a complete list of Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the state. The Government is beneficiary now. Will you do so?"

This was almost too much, and I lost my temper.

"You will get no such list from me," I said, and I got up and left him.

Id.

34. *Id.*

lawsuit filed with regard to these insurance claims against American insurance giant New York Life Insurance Company.³⁵ Similar to the Holocaust restitution insurance litigation, the claimants sought for New York Life to pay on the policies, alleging, among other claims, constructive trust, unjust enrichment, breach of good faith and fair dealing, and money had and received.³⁶

New York Life did not dispute that it sold such policies to the Armenian population in Ottoman Turkey.³⁷ It argued, however, that the suit should be dismissed because all of the policies contained forum-selection clauses mandating that if a dispute ever arose about the policies, the parties would resolve such a dispute either before French or English courts.³⁸ In addition, New York Life argued that, since the policies were written and allegedly unpaid almost a century ago, the lawsuits were time-barred.³⁹

California, which has the largest population of residents of Armenian descent in the United States,⁴⁰ came to the rescue. In 2001, the California legislature enacted a statute similar to earlier statutes it passed in response to the Holocaust-era suits extending the statute of limitations period (known in civil law countries as prescription).⁴¹

35. *Marootian v. N.Y. Life Ins. Co.*, No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274, at *2–4 (C.D. Cal. Dec. 3, 2001).

36. *Id.* at *4–5.

37. *Id.* at *2, *8 (discussing as an established fact that New York Life sold life insurance policies to Armenians in the Ottoman Empire, while New York Life sought to bar these claims from court via the forum-selection clause in the contracts).

38. *Id.* at *8–9.

39. *Id.* at *40–49.

40. Nicole E. Vartanian, *A Fruitful Legacy: Armenian Americans in California*, COBBLESTONE, May 2000, at 10, 11 (“The United States is now home to more than one million Armenians. Approximately half of this population resides in California, largely in the cities of Glendale, Fresno, Los Angeles, and San Francisco.”).

41. CAL. CIV. PROC. CODE § 354.4 (West 2006). Section 354.4 reads as follows:

(a) The following definitions govern the construction of this section:

(1) “Armenian Genocide victim” means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.

(2) “Insurer” means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.

California's Armenian insurance prescription statute did the following: (1) allowed suits to collect benefits on Armenian Genocide-era policies to be heard in California courts, despite the forum-selection clauses in the policies; and (2) extended the limitations period of such suits to 2010.⁴² In January 2004, success was achieved when the parties agreed to settle the Armenian insurance claims against New York Life for \$20 million.⁴³

The settlement with New York Life did not end the Armenian Genocide insurance litigation. After the settlement with New York Life, a team of lawyers working on this litigation filed, on behalf of other Armenian plaintiffs, three additional lawsuits. The first two class action lawsuits were filed against two European insurance companies that likewise sold policies to Armenians in Ottoman Turkey: The French insurance company AXA⁴⁴ and the German insurer Victoria Insurance.⁴⁵ Both of these insurance companies had previously been sued by Holocaust survivors and heirs for their alleged failure to pay on Holocaust-era insurance policies. The Armenian Genocide heirs' suits against AXA were settled in 2005 for \$17.5 million and the first payouts

(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.

(c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010.

(d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Id.

42. *Id.*

43. See Harut Sassounian, *Armenian-American Lawyers and Leaders Should Counter Ruling of Appeals Court*, ARMENIA NEWS BULL. (Armenian General Benevolent Union, New York, N.Y.) Aug. 31, 2009, <http://agbu.org/newsbulletin/2009-08-0831.pdf>.

44. Complaint, *Kyurkjian v. AXA*, No. 2:02-cv-01750-CAS-Mc (C.D. Cal. Feb. 28, 2002); Complaint, *Ouzounian v. AXA*, No. 2:05-cv-02596-CAS-Mc (C.D. Cal. Apr. 8, 2005).

45. Complaint, *Movsesian v. Victoria Versicherung*, No. 2:05-cv-03-9407 (C.D. Cal. Dec. 23, 2003).

from the settlement were made in 2007.⁴⁶ The suit against Victoria Insurance did not fare as well.

Reverend Father Vazken Movsesian and his fellow Armenian plaintiffs brought the third lawsuit in 2003 against Victoria Insurance⁴⁷ (represented by its current owner, German insurer Munich Re).⁴⁸ After seven years of winding through procedural motions and appeals, the Ninth Circuit Court of Appeals allowed the claims to proceed forward on December 10, 2010.⁴⁹ The *Movsesian I* class action plaintiffs sued for benefits flowing from insurance policies that Victoria Insurance issued to their ancestors in Ottoman Turkey at the end of the nineteenth century and in the first decade of the twentieth century.⁵⁰ While the statute of limitations normally would have expired for insurance claims arising out of contracts dating back to the Armenian Genocide, the California Legislature enacted section 354.4 of the California Code of Civil Procedure to allow such claims to survive,⁵¹ including language as specific as “Armenian Genocide victim,” and allowing such victims or beneficiaries of insurance policies purchased between 1875 and 1923 to bring an action to recover damages.⁵² However, the passage of the

46. *AXA Pays Out to the Descendent of Victims of the Armenian Genocide*, ARMENIAN GENOCIDE INFORMATION CENTRE (UK) (Nov. 21, 2007), <http://www.armenian-genocide.info/2007/11/axa-pays-out-to-descendants-of-victims.html>; Amanda Bronstad, *Attorneys Ordered to Produce Records in Armenian Genocide Settlement*, LAW.COM (MAY 4, 2011), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202492829090>.

47. *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052, 1055 (9th Cir. 2009).

48. The full name of Munich Re is Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG, and it was named as a co-defendant in the case. *Id.* Another subsidiary of Munich Re, Ergo Versicherungsgruppe AG, alleged also to have sold insurance policies to Armenians in Ottoman Turkey, was named a co-defendant as well. *Id.* Hereinafter all three defendants will be referred to collectively as “Victoria Insurance.”

49. *Movsesian v. Victoria Versicherung AG (Movsesian II)*, 629 F.3d 901 (9th Cir. 2010).

50. *Id.* at 904.

51. *Id.* at 903–04 (“In 2000, the California legislature enacted Senate Bill 1915 which amended California’s Code of Civil Procedure to provide California courts with jurisdiction over certain classes of claims arising out of insurance policies that were held by ‘Armenian Genocide victim[s]’[, and to] . . . amend[] the Code to extend the statute of limitations for such claims until December 31, 2010.”). In the legislative findings accompanying the statute, the California legislature recognized that “during the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. *This period is known as the Armenian Genocide.*” S. 1915, 2000 Leg., § 1(a) (Cal. 2000) (emphasis added).

52. See *Movsesian II*, 629 F.3d at 904 (quoting CAL. CIV. PROC. CODE § 354.4 (West 2006)).

statute (notably introduced in the California legislature as Senate Bill No. 1915—for the year when the Armenian Genocide began) did not solve the limitations problem for the Armenian plaintiffs in *Movsesian I*. Before the district court, Victoria Insurance argued that the California statute was unconstitutional because the state, through this statute, had impermissibly encroached on the foreign affairs power of the federal government by recognizing the Armenian Genocide.⁵³ In December 2003, Los Angeles-based federal judge Christina Snyder rejected that argument and denied defendant Victoria Insurance's Rule 12(b)(6) motion to dismiss.⁵⁴

Victoria Insurance appealed to the Ninth Circuit, where a divided panel initially agreed with the defendant insurance company and reversed Judge Snyder. In a 2–1 majority decision, the Ninth Circuit held in *Movsesian I* that the use of the words “Armenian Genocide” in section 354.4 provided a basis for the federal foreign affairs power to preempt the statute.⁵⁵ In support of this holding, Judge David R. Thompson (in agreement with Judge Dorothy W. Nelson) reasoned that section 354.4 conflicted with the policy of the federal executive for the United States not to officially recognize the Armenian Genocide.⁵⁶ The *Movsesian I* decision pointed to three House Resolution bills that sought to recognize the Armenian Genocide, all of which were denounced by the president during the Clinton and Bush Administrations⁵⁷—and were eventually defeated. The bills never made it to a House vote due to protests by President Bill Clinton and other officials in his Administration, and because of protests by Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates during

53. Order Granting in Part and Denying in Part Defendant Munich Re's Motion to Dismiss the Second Amended Complaint at 19, *Movsesian v. Victoria Versicherung AG*, No. CV-03-0947 CAS (MCx) (C.D. Cal. June 7, 2007); see also Sinan Kalayoglu, *Correcting Mujica: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L.J. 1045, 1046 (2007) (“FAD provides that, in the absence of a treaty or federal statute, a state may still violate the U.S. Constitution by passing a law that impermissibly intrudes upon the federal government's power over foreign affairs.”).

54. Order Granting in Part and Denying in Part Defendant Munich Re's Motion to Dismiss the Second Amended Complaint, *supra* note 53, at 28–29, 37.

55. *Movsesian I*, 578 F.3d 1052, 1053, 1062 (9th Cir. 2009).

56. *Id.*

57. *Id.* at 1057–59. The three defeated House resolutions were (1) Affirmation of the United States Record on the Armenian Genocide Resolution, H.R. Res. 596, 106th Cong. (2000); (2) H.R. Res. 193, 108th Cong. (2003); and (3) Affirmation of the United States Record on the Armenian Genocide Resolution, H.R. Res. 106, 110th Cong. (2007).

the George W. Bush Administration.⁵⁸ Specifically, the letters during both Administrations urged against American recognition of the Armenian Genocide out of concern for the harm it might cause to American foreign relations with Turkey, a longstanding American ally in its “global war on terror.”⁵⁹ The *Movsesian I* panel concluded that these letters and negotiations between the Executive Branch and Congress clearly established the “emergence of an express federal policy” against recognition of the Armenian Genocide.⁶⁰ Additionally, the panel found that section 354.4 poses a threat to the Executive Branch’s diplomatic relations with Turkey and that the state statute conflicted with the President’s power to speak for the nation with one voice.⁶¹

Judge Harry Pregerson issued a spirited dissent, arguing that the use of the term “Armenian Genocide” in section 354.4 does not *ipso facto* make the statute unconstitutional.⁶² The *Movsesian* appellants filed petition for panel rehearing and rehearing en banc.⁶³ After no word for

58. *Movsesian I*, 578 F.3d at 1057–61.

59. *Id.* at 1059; see also Alan O. Makovsky, *Turkey, in THE PIVOTAL STATES: A NEW FRAMEWORK FOR U.S. POLICY IN THE DEVELOPING WORLD* 88, 93–94 (Robert Chase et al. eds., 1999). Makovsky noted,

The case for Turkey’s regional “pivotalness” is straightforward. From the time it joined NATO in 1952 until the demise of the Soviet Union in 1991, Turkey . . . presided over one of the world’s key choke points

In the Middle East, Turkey was an important ally for the United States during the 1991 gulf war. . . . U.S. bombers were granted permission to launch raids on Iraq from Incirlik Air Force base in southern Turkey.

Makovsky, *supra*, at 93–94. For further elaboration, see NASUH USLA, *TURKISH FOREIGN POLICY IN THE POST-COLD WAR PERIOD* 57–58 (2004). Usla provided the following description:

The post-Cold War period have [sic] witnessed an extraordinary increase in Turkey’s importance in the eyes of American politicians and strategists. Turkey is now at the center of a new phenomenon, which has important meanings for the United States: the emergence of new security areas or new alliances in critical regions.

. . . The Turkish cooperation with and support for Israel, America’s crucial ally in the region, is indispensable from the American point of view.

Id.

60. *Movsesian I*, 578 F.3d at 1060.

61. *Id.* at 1062.

62. *Id.* at 1063 (Pregerson, J., dissenting).

63. See *Movsesian II*, 629 F.3d 901, 903 (9th Cir. 2010) (identifying that the petition was filed); Order Requiring Defendant-Appellant to File a Response to Plaintiff-Appellees’

over a year from the Ninth Circuit on the petition, the same *Movsesian* panel on December 10, 2010, issued a new decision announcing a dramatic turnaround.⁶⁴ In *Movsesian II*, the panel, in a new majority decision by Judge Pregerson, found section 354.4 to be constitutional.⁶⁵ The change was due to a reconfiguration of how the three panel judges voted. This time, Judge Nelson voted with Judge Pregerson, forming a new majority, with Judge Thompson in dissent.

The *Movsesian II* decision succinctly summarized at the outset why section 354.4 is constitutional:

The primary issue in this appeal is whether § 354.4 conflicts with a clear, express federal executive policy. We conclude that there is no express federal policy forbidding states to use the term “Armenian Genocide,” and we affirm the district court.⁶⁶

It is notable that in upholding the constitutionality of section 354.4, the new majority distinguished its facts from those encountered by the United States Supreme Court in an earlier Holocaust restitution case: *American Insurance Association v. Garamendi*.⁶⁷ In *Garamendi*, the Supreme Court, in a 5–4 decision, held that a California statute mandating that insurance companies doing business in California make public any information about Holocaust-era policies issued by them in pre-war Europe amounted to an unconstitutional encroachment of the federal foreign affairs power.⁶⁸ According to the *Garamendi* majority, such a state mandate conflicted with executive agreements signed by President Clinton with Germany (along with pronouncements by presidential officials) to fully and finally conclude all Holocaust-era restitution claims, including insurance claims, with Germany and all

Petition for Panel Rehearing and Rehearing En Banc, *Movsesian II*, 929 F.3d 901 (9th Cir. Oct. 23, 2009) (No. 07-56722) (same).

64. *Movsesian II*, 629 F.3d at 903. The petition was granted with respect to a rehearing en banc during the publication of this Article. Order Granting Petition for Rehearing En Banc, *Movsesian II*, 629 F.3d 901 (9th Cir. Nov. 7, 2011) (No. 07-56722), 2011 WL 5336269.

65. *Id.*

66. *Id.*

67. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). To date, two Holocaust restitution cases have reached the Supreme Court. In addition to *Garamendi*, involving Holocaust-era insurance, the Court in 2004 heard a Nazi looted-art case: *Republic of Austria v. Altmann (Altmann III)*, 541 U.S. 677, 680 (2004). See *infra* text accompanying note 196.

68. *Garamendi*, 539 U.S. at 415–17.

German entities, public and private.⁶⁹ With regard to the presidential policy on the Armenian Genocide, however, the *Movsesian II* majority found that there was no such formal executive agreement.⁷⁰

According to the new majority:

In *Garamendi*, the Court found that several executive agreements, coupled with statements from executive branch officials, constituted an express federal policy. Here, in contrast, there is no executive agreement regarding use of the term “Armenian Genocide.”

Instead, . . . [all we have are] informal presidential communications as the sole source of a clear, express federal policy against use of the term “Armenian Genocide.”⁷¹

As the new majority decision noted, “[N]ot every executive action or pronouncement constitutes a proper invocation of that potentially preemptive [foreign] policy-making power.”⁷²

Moreover, the new majority held that any pronouncements by the various presidential administrations that *did not* recognize the events of 1915–1923 as a genocide were contradicted by presidential pronouncements to the contrary: “The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.”⁷³ These statements were all issued on or around April 24 and so meant to mark the Day of Remembrance of the Armenian Genocide. First, in 1981, President Reagan explicitly stated, “Like *the genocide of the Armenians* before it, and the genocide of the Cambodians which followed it—and like too many other persecutions of too many other people—the lessons of the Holocaust must never be forgotten.”⁷⁴ Second, in 1998, President Clinton publicly commemorated “*the deportations and massacres of a million and a half Armenians* in the

69. *Id.* at 405–07, 414–20.

70. *Movsesian II*, 629 F.3d at 906.

71. *Id.* (citing *Garamendi*, 539 U.S. at 415).

72. *Id.* (citing *Medellin v. Texas*, 552 U.S. 491, 531–32 (2008)).

73. *Id.* at 906.

74. Proclamation No. 4838, 3 C.F.R. 25 (1981) (emphasis added).

Ottoman Empire in the years 1915–1923.”⁷⁵ Then, in 2009, President Obama publicly remembered “*the 1.5 million Armenians who were . . . massacred or marched to their death in the final days of the Ottoman Empire. The Meds Yeghern*”⁷⁶ must live on in our memories, just as it lives on in the hearts of the Armenian people.”⁷⁷

On the legislative side, while the U.S. Senate never made statements about the Armenian Genocide, the House of Representatives has done so in two resolutions: (1) in 1975, the House observed “a day of remembrance for *all victims of genocide, especially those of Armenian ancestry*”;⁷⁸ and (2) in 1984, the House recognized “*victims of genocide, especially the one and one-half million people of Armenian ancestry*.”⁷⁹

75. Message on the Observance of Armenian Remembrance Day, 1998, 1 PUB. PAPERS 617, 617 (Apr. 24, 1998) (emphasis added).

76. The Armenian term Meds Yeghern, meaning “great calamity,” is commonly used to describe the “Armenia Genocide.” Ben Schott, *Schott’s Vocab: Meds Yeghern*, N.Y. TIMES (May 6, 2009), <http://schott.blogs.nytimes.com/2009/05/06/meds-yeghern/>.

77. Presidential Statement of President Barack Obama on Armenian Remembrance Day (Apr. 24, 2009) (emphasis added). Moreover, during his presidential campaign, candidate Obama asserted on the Senate floor that “[i]t is imperative that we recognize the horrific acts carried out against the Armenian people as genocide.” 154 CONG. REC. S3438-01 (daily ed. Apr. 28, 2008) (statement of Sen. Barack Obama). Notably, President Obama’s failure to use the G-word in English, making reference to it only in the Armenian language, was criticized by many in the Armenian-American community in light of his prior campaign pledge. See Huma Khan, *Despite Campaign Pledge, President Obama Refuses to Use Word ‘Genocide’ When Describing the Slaughter of Armenians*, ABCNEWS.COM (Apr. 24, 2009, 2:26 PM), <http://abcnews.go.com/blogs/politics/2009/04/despite-campaig/>. On April 24, 2010, President Obama likewise used euphemisms rather than the G-word:

On this *solemn day of remembrance*, we pause to recall that 95 years ago, *one of the worst atrocities of the 20th century* began. In that *dark moment of history*, 1.5 million Armenians were massacred or marched to their death in the final days of the Ottoman Empire.

Today is a day to reflect upon and draw lessons from these terrible events. I have consistently stated my own view of what occurred in 1915, and my view of that history has not changed. It is in all of our interest to see the achievement a full, frank, and just acknowledgment of the facts. The *Meds Yeghern* is a devastating chapter in the history of the Armenian people, and we must keep its memory alive in honor of those who were murdered and so that we do not repeat the grave mistakes of the past.

Even as we confront *the inhumanity of 1915*, we also are inspired by the remarkable spirit of the Armenian people . . .

Today, we pause with them and with Armenians everywhere to remember the *awful events of 1915* . . .

Presidential Statement on Armenian Remembrance Day (Apr. 24, 2010) (emphasis added).

78. H.R.J. Res. 148, 94th Cong. (1975) (emphasis added).

79. H.R.J. Res. 247, 98th Cong. (1984) (emphasis added).

Moreover, some forty states, including California, have issued statements recognizing the Armenian Genocide, and the federal government never expressed any opposition to such recognitions. In light of these facts, the new majority decision concluded as follows:

Considering the number of expressions of federal executive and legislative support for recognition of the Armenian Genocide, and federal inaction in the face of explicit state support for such recognition, we cannot conclude that a clear, express federal policy forbids the state of California from using the term “Armenian Genocide.”⁸⁰

In addition to finding no actual conflict preemption, Judge Pregerson also considered whether field preemption⁸¹ would make the California statute unconstitutional. He found that it did not. Neither Congress nor the Executive had preempted the field covered by the statute because “California’s attempt to regulate insurance [through section 354.4] clearly falls within the realm of traditional state interests.”⁸²

80. *Movsesian II*, 629 F.3d 901, 907 (9th Cir. 2010).

81. Thomas W. Merrill provides the following definition of field preemption:

[Field preemption] applies when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’” The idea here is that if federal law is sufficiently comprehensive so as to constitute a complete code of regulation, then the court will attribute an intention to Congress to displace state law.

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 739 (2008).

82. *Movsesian II*, 629 F.3d at 907. In the quote below, Judge Thompson criticized the majority and stated that field preemption did indeed apply here because California, though purportedly aiming to regulate insurance (traditionally a subject left to the states), had a hidden aim in enacting section 354.4—to conduct foreign policy:

In this case, even though § 354.4 purports to regulate the insurance industry, its real purpose is to provide relief to the victims of “Armenian Genocide.” . . . In short, § 354.4 is California’s attempt to provide relief to a specific category of claimants who were aggrieved by a foreign nation, not a general attempt to regulate the insurance industry. While this may be a commendable goal, it is not an area of “traditional state responsibility,” and the statute is therefore subject to a field preemption analysis.

Id. at 910–11 (Thompson, J., dissenting).

The *Movsesian II* decision provides a significant victory to the burgeoning Armenian Genocide-era restitution movement. Any restitution claims for material losses arising out of the mass destruction of the Armenian community in Ottoman Turkey and the concomitant theft that took place in the first two decades of the twentieth century necessarily confront the problem that such claims might be time-barred. If this problem can be remedied by the passage of a state law that (1) explicitly recognizes such claims under state law and (2) extends the limitations period for such claims to a future date, state courts applying such law—and federal courts doing likewise under diversity jurisdiction procedural rules—now can examine their claims on their merits rather than dismissing them for lack of timeliness. That California is ready to hear such claims was confirmed in 2010 when State Assemblyman Mike Gatto authored a bill that would increase the statute of limitations until 2016. The Governor of California signed the bill and the California legislature extended the limitations period of section 354.4 (and its sister statute, section 354.45⁸³) from 2010 to 2016.⁸⁴

B. Suing the Tangential Actors Redux: The German Banks

In 2006, Yeghiayan and his co-counsel filed a new suit against the German banks Deutsche Bank and Dresdner Bank, seeking to recover money and property allegedly withheld by these defendants during the Armenian Genocide from their Armenian depositors.⁸⁵ The German banks were also accused of trading in assets stolen from the Armenian victims by the Ottoman Turkish state perpetrators.⁸⁶ The complaint in the action initially recited the historical facts of the murder and deportation of the Armenian population of Ottoman Turkey, including the death of 1.5 million to 2 million Armenians between 1915 and 1923.⁸⁷

83. For discussion of CAL. CIV. PROC. CODE § 354.45 (West 2006), see *infra* notes 126–41 and accompanying text.

84. CAL. CIV. PROC. CODE § 354.4(c) (West 2006) (action “shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010”); CAL. CIV. PROC. CODE § 354.45 (similar language used); § 354.5(c) (using nearly-identical language); see also Harut Sassounian, *California to Extend Until 2016 Deadline to Sue Insurance Companies*, ARMENIAN WKLY. (Mar. 31, 2011), <http://www.armenianweekly.com/2011/05/31/california-to-extend-until-2016-deadline-to-sue-insurance-companies/>.

85. *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian III)*, No. CV 06-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957, at *2 (C.D. Cal. July 30, 2010).

86. *Id.* at *2, *21–23.

87. *Id.* at *7–8. As the *Deirmenjian III* court explained,

The bulk of the complaint, however, focused not on the extermination of the Armenians but on the theft of the victims' property.⁸⁸ As the Holocaust has so aptly demonstrated, part and parcel to every genocide is not only murder but also massive theft of the victims' assets.⁸⁹ The Armenian Genocide likewise contains this characteristic.

The filing of the suit against the two German banks marked an important step in closing in on the circle of perpetrators and beneficiaries of the Armenian Genocide. In the claims by the Armenian heirs against the insurance companies, the Armenian Genocide played a tangential role in the litigation; in contrast, the instant action accused the German banks of being directly involved in the theft of the assets of the Armenians during the genocide.⁹⁰ While literature on the murder and deportation of the Armenians is voluminous and well-documented,⁹¹ discussion of the theft of the property of the Armenians still awaits a thorough study.⁹²

In the late nineteenth and early twentieth centuries, many ethnic Armenians lived in the Ottoman Empire. Plaintiffs allege that in 1910, shortly after coming to power, a regime known as the Young Turks began to "cleanse" the Ottoman Empire of all non-Turks, including ethnic Armenians. Plaintiffs assert that, initially, the Young Turks "deported and relocated" Armenians from population centers to the deserts of Syria. They contend that, when World War I erupted, however, the Young Turks launched a systematic campaign to deport and kill ethnic Armenians. Specifically, plaintiffs assert that, while ostensibly continuing its "deportation and relocation" program, the government issued a secret directive ordering the military to exterminate all males under fifty, soldiers, priests, and teachers of Armenian ethnicity. Women and children were to be Islamized. Plaintiffs maintain that, between April 1915 and 1923, an estimated 1.5 million to 2 million Armenians were killed. This period has come to be known as the Armenian Genocide.

Id. (internal citations omitted).

88. *Id.* at *3 (explaining the theories on which plaintiffs sought recovery).

89. DONALD BLOXHAM, *THE FINAL SOLUTION: A GENOCIDE* 41 (2009). There have been material motivations and benefits from genocide. *Id.* "[B]yproducts like property theft from the victims were an important means of further binding the beneficiaries to each other and the regime" despite the primary goals, which were to "remov[e] 'problem' groups while simultaneously sharpening and rendering more exclusive the identity of the majority." *Id.*

90. *Deirmenjian I*, 2010 U.S. Dist. LEXIS 86957, at *2, *9–20. "Plaintiffs assert that the banks 'concealed and prevented' the recovery of assets that were deposited in accounts with 'Old Deutsche Bank' and 'Old Deutsche Orientbank' by Armenians prior to the First World War and the Armenian Genocide." *Id.* at *2.

91. See generally TANER AKÇAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY* (2006) (showing recent studies on the Armenian Genocide); DONALD BLOXHAM, *GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* (2005).

92. For discussions of theft during the Armenian Genocide, see UĞUR ÜMIT ÜNGÖR &

The *Deirmenjian* suit focused on the alleged role of the German banks as conduits for the theft of the Armenians' assets.⁹³ The allegations eerily paralleled those cases involving theft of Jewish property during the Holocaust and the role of Swiss and German financial institutions in facilitating such theft. In fact, the same two German banks were sued by Jewish victims of Nazism and their heirs, who alleged that Deutsche Bank and Dresdner Bank colluded with the Nazi regime to steal from Jews in Europe and profited from those dealings.⁹⁴ Procedurally, the suit against the German banks followed the model of the Holocaust restitution suits by proceeding as a class action. Varoujan Deirmenjian and his six fellow plaintiffs did not sue just on their own behalf but also on behalf of all other similarly situated heirs of Armenian victims.⁹⁵ All seven plaintiffs are American citizens and are grandchildren of the Armenian victims of the genocide.⁹⁶

The complaint in *Deirmenjian* alleged that the Armenian minority in Ottoman Turkey relied on the stability of the European banks and, therefore, deposited assets in such banks for their protection.⁹⁷ The two German banks, operating in Ottoman Turkey under the name of Deutsche Orient Bank, allegedly had over a dozen branches throughout the Ottoman Empire and targeted affluent Armenians as their customers.⁹⁸ With the onset of the killings and deportations of

MEHMET POLATEL, CONFISCATION AND DESTRUCTION: THE YOUNG TURK SEIZURE OF ARMENIAN PROPERTY (2011) (discussing theft of Armenian property); HRAYR S. KARAGUEUZIAN & YAIR AURON, A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH (2010); Dickran Kouymjian, *Confiscation and Destruction: A Manifestation of the Genocidal Process*, ARMENIAN F., Autumn 1998, at 1, 1–2; and Dickran Kouymjian, Professor, Sonoma State Univ., Lecture at Sonoma State Univ. Holocaust Lecture Series: When Does Genocide End? The Armenian Case (Mar. 11, 2003), available at http://www.ancsf.org/files/essaysanalysis/When_Does_Genocide_End.pdf.

93. *Deirmenjian I*, 2010 U.S. Dist. LEXIS 86957, at *9–20 (focusing on the banks role and involvement in the Genocide claims and its post-Genocide responsibility to its insurers).

94. See Christopher Simpson, *Introduction to WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK: OFFICE OF MILITARY GOVERNMENT (U.S.) REPORTS 1, 1* (Christopher Simpson ed., 2002) (studying the German Bank activities during the Nazi era); HAROLD JAMES, *DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY* 57–59, 63 (2006).

95. *Deirmenjian I*, 2010 U.S. Dist. LEXIS 86957, at *2.

96. *Id.* at *8–9, *12, *15, *17, *19.

97. First Amended Class Action Complaint and Demand for Jury Trial at 7, *Deirmenjian v. Deutsche Bank*, No. CV 06-0774 MMM (RCx) (C.D. Cal. Sept. 25, 2006) [hereinafter *Deirmenjian* Complaint].

98. *Id.* ¶¶ 12–13. Similar allegations were made against the Swiss banks: Jews fearing the troubled times after Hitler's rise to power and as a result of historic anti-Semitism in

Armenians, the German banks allegedly accepted gold deposits from the Ottoman Turkish government with full knowledge that such deposits were taken from the Armenian victims.⁹⁹ Moreover, the German banks allegedly transferred to their own books assets belonging to their deceased Armenian customers rather than returning those assets to the customers' heirs, and they deliberately concealed the existence of the deposits from such heirs.¹⁰⁰

Plaintiffs divided themselves into two classes: Class A plaintiffs were designated as "[t]he rightful owners of monies and other properties deposited by individuals of Armenian descent between 1875 and 1915 in the [defendant banks'] offices located in Ottoman Turkey, whose property had not been returned";¹⁰¹ and Class B plaintiffs were designated as "[t]he rightful owners of looted assets forcibly taken by the government of the Ottoman Turkish Empire after 1875 and deposited with the [defendants], whose property had not been returned."¹⁰²

As noted above, what differentiates the suit against the German banks from the earlier litigation against the insurance companies is that the defendants targeted in this suit allegedly participated directly in the theft portion of the Armenian Genocide and colluded directly with the Ottoman Turkish authorities in such theft.¹⁰³ The defendant insurers in the earlier litigation had no involvement in the genocide, but merely had issued policies to individuals who perished in the genocide. The *Deirmenjian* suit, therefore, seeks to replicate the success of the Holocaust restitution litigation by (1) utilizing the U.S. judicial procedural mechanism of a class action; (2) targeting foreign multinational corporations that do extensive business within the United States; (3) alleging wrongful acts committed by these defendants outside

Europe deposited moneys in Swiss banks for protection and privacy. See BAZYLER, *supra* note 6, at 43, 52.

99. *Deirmenjian* Complaint, *supra* note 97, ¶ 35; cf. BAZYLER, *supra* note 6, at 26 (explaining that in the Holocaust restitution litigation, both Swiss banks and German banks were accused of knowingly accepting from the Nazis gold and other assets looted from the Jews).

100. *Deirmenjian* Complaint, *supra* note 97, ¶ 37; cf. BAZYLER, *supra* note 6, at 43, 66–67 (explaining that, in a similar vein, the Swiss banks were accused of keeping assets deposited for safekeeping by their Jewish customers who perished during the Holocaust; a similar allegation was made against the German banks).

101. *Deirmenjian* Complaint, *supra* note 97, ¶ 6.a.

102. *Id.* ¶ 6.b.

103. See *supra* notes 90–93 and accompanying text.

the United States that helped to facilitate theft from a targeted victim group during a genocide; and (4) alleging acts committed decades earlier.

In 2006, plaintiffs scored a major victory in the litigation when Los Angeles-based federal judge Margaret Morrow, presiding over the litigation, denied the banks' motion to dismiss the class action.¹⁰⁴ According to the banks' motion, the case should have been dismissed at the outset on three major procedural grounds.¹⁰⁵ First, the banks raised the procedural defense of *forum non conveniens*, the judicially-created doctrine that directs courts to dismiss a suit over which it has jurisdiction when a variety of public and private interest factors call for dismissal of the suit in the United States in favor of another forum.¹⁰⁶ The German banks sought for the case to be litigated before German courts despite the fact that they conceded they did sufficient business in the United States and, specifically, in California, for a court in California to exert personal jurisdiction over them.¹⁰⁷ Nevertheless, they contended that the case should be tried in Germany where the banks were headquartered and where any records of their business in the Ottoman Empire would be located.¹⁰⁸

Second, the banks argued that in order for an American court to determine the merits of plaintiffs' case, the court would be required to judge the validity of the Ottoman government's decrees involving the alleged expropriation of the property of the Armenians.¹⁰⁹ This predicate to the resolution of the suit implicated the act of state doctrine, another judicially-created doctrine that calls for American judges to abstain from deciding cases when they must pass on the validity of the acts of foreign states.¹¹⁰ Finally, the banks claimed that the suit was barred by the statute of limitations since it involved acts

104. *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian I)*, No. CV 06-00774 MMM (CWx), 2006 U.S. Dist. LEXIS 96772, at *150-51 (C.D. Cal. Sept. 11, 2006).

105. *Id.* at *5 & n.8.

106. *Id.* at *12-15. See BORN & RUTLEDGE, *supra* note 14, at 347, for a definition of the doctrine of *forum non conveniens*: "*Forum non conveniens* is a common law doctrine that permits a court to decline to exercise judicial discretion if an alternative forum would be substantially more convenient or appropriate." Further, central to the "*forum non conveniens* doctrine is a 'weighing' of 'private' and 'public' interest factors" that have been set forth by the United States Supreme Court. *Id.* at 387.

107. *Deirmenjian I*, 2006 U.S. Dist. LEXIS 96772, at *5, 12.

108. *Id.* at *16, *44-45.

109. *Id.* at *69-76.

110. *Id.* at *69-71.

that allegedly took place ninety years ago.¹¹¹ Therefore, any prescription period had long ago expired.

In a lengthy opinion, the court rejected each of these arguments. With regard to the doctrine of *forum non conveniens*, the court found that even though German courts were capable of resolving this suit, because plaintiffs were all American citizens the court would not disturb the American plaintiffs' choice of an American forum. As the court explained, "[An American] plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the [foreign] defendant 'as to be out of proportion to plaintiff's convenience.'"¹¹² Here, California was not considered such an inconvenient forum for the German bank defendants.¹¹³ Interestingly, factors cited by the court to allow the suit to proceed in California included the local interests in the Armenian-American population and the resolution of these claims.¹¹⁴ As the court explained, roughly 1.5 million Armenians reside in the United States, 800,000 of whom live in California.¹¹⁵ "In fact, California is home to the largest population of Armenians in the world outside of the Republic of Armenia."¹¹⁶

In deciding whether to dismiss the suit against the German banks on the basis of the act of state doctrine, the court initially acknowledged that the case appeared to come within the doctrine by requiring an American court to decide the validity of acts of a foreign government committed within its own territory. The court noted as follows:

[R]esolution of this action—or at least some of plaintiffs' claims—in plaintiffs' favor would require a declaration that the Ottoman Empire's acts and decrees were invalid. Stated differently, in order for the court to conclude that defendants wrongfully converted Armenians' assets, it would first have to find that the Young Turks' confiscation of the assets was invalid and that the assets rightfully belonged to plaintiffs' ancestors. Thus, although the Ottoman Empire is not a named defendant, it

111. *Id.* at *109.

112. *Id.* at *68 (internal citations omitted).

113. *Id.* at *69.

114. *Id.* at *62–63.

115. *Id.* at *57.

116. *Id.*

is clear that certain acts of that government, performed within its own territory, are at issue in the case.¹¹⁷

The court nevertheless did not abstain from deciding the action on the grounds of the act of state doctrine.¹¹⁸ It first noted that the lawsuit did not ask the court to become enmeshed in the political debate over whether to label the massacres of the Armenians as “genocide.”¹¹⁹ Moreover, the United States Department of State had not stated that it was opposed to this litigation. As Judge Morrow explained, “This lawsuit . . . challenges the Young Turks’ expropriation of Armenian assets; whatever its outcome, it will not require the Executive Branch to condemn the Armenian Genocide. Nothing in the proceedings . . . indicates that the State Department would oppose adjudication of this action.”¹²⁰

The German banks third argument was that the suit be dismissed because the period of prescription had expired.¹²¹ On first blush, the prescription, or statute of limitations, defense appeared to be the German banks’ strongest argument. As noted earlier, such claims alleging wrongful acts occurring over ninety years ago would no longer be actionable today, at least not ordinarily.¹²² California, however, has a law on its books—California Code of Civil Procedure section 348, which dates back to 1873—stating that there is no limitation on “actions brought to recover money or other property deposited with any bank.”¹²³ Because lead plaintiff Deirmenjian and his fellow Class A

117. *Id.* at *75–76.

118. *Id.* at *93–94.

119. *Id.* at *91.

120. *Id.* at *91–92.

121. *Id.* at *109–10.

122. *See, e.g.*, CAL. CIV. PROC. CODE § 338 (West 2006) (stating the ordinary statute of limitations for a civil action is three years). Unlike serious domestic felonies such as murder, or severe international crimes like genocide, or crimes against humanity, for which no statute of limitations period is recognized and the wrongdoer defendant can always be criminally prosecuted, civil suits traditionally have a time period during which the suit against the defendant must be brought. *Compare id.*, with CAL. PENAL CODE § 799 (West 2008) (stating there is no statute of limitations for crimes punishable by death, life imprisonment, or embezzlement of public money).

123. CAL. CIV. PROC. CODE § 348 (West 2006). The statute provides that

To actions brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society or evidenced by a certificate issued by an industrial loan company or credit

plaintiffs sought the return of funds deposited by their ancestors in the Deutsche Orient Bank, Judge Morrow found, applying the broad language of section 348 quoted above, that their deposited assets claims were not time-barred.¹²⁴

The Class B plaintiffs, with Raffi Bakian as their class representative, did not fare as well. Since the no-limitations rule of section 348 did not apply to Class B's looted assets claims, Judge Morrow dismissed these claims as untimely.¹²⁵ However, Judge Morrow allowed Class B plaintiffs to file another amended complaint to demonstrate that they could somehow avoid the applicability of the statute of limitations by showing that, on principles of equity, the statute of limitations should be tolled or the German banks should be estopped from asserting the statute.¹²⁶

Bakian and his fellow Class B plaintiffs did file such an amended complaint. This time, however, they based their argument for their looted assets claims as still being ripe not solely on principles of equity but upon a new statute enacted by California *after* the court's dismissal of the Class B claims in *Deirmenjian*.¹²⁷ The statute, California Code of Civil Procedure section 354.45 (akin to the previously-discussed section 354.4 utilized by the plaintiffs in *Movsesian*¹²⁸), was adopted by the California legislature specifically to help claimants overcome the

union there is no limitation.

This section shall not apply to banks, bankers, trust companies, building and loan associations, industrial loan companies, credit unions, and savings and loan societies which have become insolvent and are in process of liquidation and in such cases the statute of limitations shall be deemed to have commenced to run from the beginning of the process of liquidation; provided, however, nothing herein contained shall be construed so as to relieve any stockholder of any banking corporation or trust company from stockholders' liability as shall at any time, be provided by law.

Id.

124. *Deirmenjian I*, 2006 U.S. Dist. LEXIS 96772, at *133 ("Defendants have failed to show that the Class A plaintiffs' claims for recovery of bank deposits fall outside the scope of § 348. Therefore, the court denies their motions to dismiss the claims as untimely under California law.").

125. *Id.* at *149. Under California law, the longest limitations period applicable to Class B plaintiffs' claims would be four years, which had long ago expired. *Id.*

126. *Id.* at *149–51.

127. *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian II)*, 526 F. Supp. 2d 1068, 1075 (C.D. Cal. 2007).

128. See discussion of the *Movsesian* litigation *supra* notes 47–82 and accompanying text.

prescription obstacle when filing suit in California courts for recovery of assets stolen during the Armenian Genocide.¹²⁹ It provides as follows:

Any action, including any pending action brought by an Armenian Genocide victim, or the heir or beneficiary of an Armenian Genocide victim, who resides in this state, seeking payment for, or the return of, deposited assets, or the return of looted assets, shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is filed on or before December 31, 2016.¹³⁰

Plainly, under section 354.45, the Class B plaintiffs' claims would now be timely.

The court, however, held otherwise. In another lengthy opinion, issued in December 2007, Judge Morrow found section 354.45 to be unconstitutional.¹³¹ According to Judge Morrow, the new California law impermissibly intruded on the foreign affairs power of the federal government to settle wartime claims of American citizens against Turkey and Germany arising out of World War I.¹³²

In reaching this result, Judge Morrow began her analysis with the post-World War I era, when the defeated Turkish and German empires and the victorious allies, including the United States, signed a series of treaties and executive agreements in the aftermath of the war.¹³³ The most famous is the multilateral Treaty of Versailles of 1919, which ended hostilities between Germany and the Allied Powers.¹³⁴ The United States never became a party to the Treaty of Versailles because the United States Senate failed to ratify the treaty signed by President Woodrow Wilson.¹³⁵ In 1921, however, the United States and the new

129. CAL. CODE CIV. PROC. § 354.45 (West 2006); *see also* S. 1524, 2006 Leg. § 1 (Cal. 2006) (explaining section 354.45's connection with the Armenian Genocide).

130. CAL. CODE CIV. PROC. § 354.45(c).

131. *Deirmenjian II*, 526 F. Supp. 2d at 1089.

132. *Id.* at 1079.

133. *Id.* at 1079–86 (explaining the history behind section 354.45 and the agreements during the post-World War I era that lead to its enactment).

134. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, S. TREATY DOC. No. 348.

135. *Deirmenjian II*, 526 F. Supp. 2d at 1084 & n.57.

[However,] [a]lthough the United States never ratified the Treaty of Versailles, select provisions of that treaty were incorporated, *inter alia*, into the executive

German Weimar Republic entered into a bilateral peace treaty, the Treaty of Berlin, which formally ended the hostilities between the two states.¹³⁶ A year later, the two nations signed an executive agreement establishing a joint mixed commission to determine the amount of war reparations to be paid by Germany to the United States and its nationals pursuant to the Treaty of Berlin.¹³⁷ In analyzing the two postwar pacts between the United States and Germany, Judge Morrow held that (1) they necessarily were meant to cover any claims of American nationals against Germany and its nationals or business entities arising out of World War I; and (2), as a consequence, barred the instant claims of Bakian and his fellow Class B plaintiffs against the two German banks that section 354.45 specifically resurrected.¹³⁸

The problem with the court's reasoning was that it conflicted with the *Movsesian* decision issued five months earlier (the above-discussed lawsuit against German-based Victoria Insurance), which was decided by another Los Angeles-based federal judge, Judge Christina Snyder. Judge Snyder, in analyzing the same two pacts and their drafting history, found that the Treaty of Berlin of 1921 and the Mixed Commission Agreement of 1922 did not preclude claims of American nationals against German-based companies like Victoria Insurance and Munich Re arising out of the World War I.¹³⁹ The *Deirmenjian* court tried to distinguish the two decisions by noting that the plaintiffs in the *Movsesian* case were suing German insurance companies for purely private acts (failure to honor insurance contracts) while in the instant case, Bakian alleged in the complaint that the German banks "held th[e] looted assets as 'agents' of the regime during the Armenian

agreement creating the mixed commission [The Treaty of Berlin] secure[d] to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles.

Id. at 1084 n.57 (quoting Mixed Commission Agreement, U.S.-Ger., pmbl., Aug. 10, 1922, 42 Stat. 2200).

136. Treaty of Peace Between the United States and Germany, U.S.-Ger., Aug. 25, 1921, 42 Stat. 1939.

137. Mixed Commission Agreement, *supra* note 135, pmbl.

138. *Deirmenjian II*, 526 F. Supp. 2d at 1081–85, 1089.

139. Order Granting in Part and Denying in Part Defendant Munich Re's Motion to Dismiss the Second Amended Complaint at 29, *Movsesian v. Victoria Versicherung AG*, No. CV-03-09407 CAS (MCx) (C.D. Cal. June 7, 2007).

Genocide.”¹⁴⁰ The distinction, however, is trifling, and hardly a solid basis upon which to hold a state statute unconstitutional.¹⁴¹

Appearing to lack confidence in the correctness of this analysis, the court based its decision to annul section 354.45 upon another ground: the post-World War I agreements between Turkey and the Allied Powers, including the United States, which the court held also extinguished the claims allowed by section 354.45.¹⁴²

At the end of the World War I, the United States and the Republic of Turkey, the successor state to the Ottoman Turkish Empire (who was the losing co-belligerent, fighting on the side of Germany during the war), likewise entered into a bilateral agreement—called the Ankara Agreement of 1934.¹⁴³ Under the agreement, which was entered into sixteen years after cessation of hostilities and the demise of the Ottoman Turkish Empire, the newly-formed Republic of Turkey agreed to pay the United States a “lump sum” of \$1.3 million “in full settlement of claims of American citizens which are embraced by the Agreement of December 24, 1923.”¹⁴⁴ “Following payment of the lump sum settlement, Fred K. Nielsen—who had been assigned to the Turkish–American Claims Commission by the President in February 1933”—released a report (the Nielsen Report) stating that the Ankara Agreement was to be the final settlement of all claims of Turkish liability.¹⁴⁵ Judge Morrow relied on this statement in the Nielsen Report to come to the conclusion that the lump sum payment was intended by

140. *Deirmenjian II*, 526 F. Supp. 2d at 1085 n.59.

141. While not specifically so stating, Judge Morrow would most likely have made the same distinction with regard to the Class A plaintiffs in the *Deirmenjian* litigation. Under Judge Morrow’s reasoning, because the same German banks were acting as agents of Ottoman Turkey when keeping the looted assets of the Armenians but purely as private actors when keeping the deposited assets of their Armenian customers, the U.S.–German Weimar Republic agreements extinguished the looted assets claims of Class B plaintiffs but not the deposited assets claims of Class A plaintiffs. This difference in results between how the two classes of plaintiffs would fare in their claims against the German banks, based upon a legally insignificant designation of the German banks as “agents” in the portion of the Complaint setting out the looted assets claims, seems hardly a solid basis upon which to make a decision. Moreover, since Judge Morrow gave Bakian another opportunity to amend the Complaint, the “agent” allegation could easily have been taken out from the next version of the Complaint.

142. *Deirmenjian II*, 526 F. Supp. 2d at 1085.

143. Agreement Between the United States and Turkey for the Settlement of Claims, U.S.–Turk., Oct. 25, 1934, E.A.S. No. 73 [hereinafter Ankara Agreement].

144. *Id.* art. 1.

145. *Deirmenjian II*, 526 F. Supp. 2d at 1079–81.

the United States to settle all “wartime claims of American nationals of both Ottoman *and* non-Ottoman origin.”¹⁴⁶

In reaching the decision about how the Ankara Agreement should be interpreted, Judge Morrow did not rely on any expert testimony or hold additional hearings on the matter. Rather, the court’s conclusion that the Ankara Agreement barred claims of naturalized American citizens who had earlier been subjects of the Ottoman Empire was based strictly on its reading of the Nielsen Report.¹⁴⁷ A closer examination of the negotiating history of the Ankara Agreement demonstrates, however, that Judge Morrow’s conclusion that this postwar reparations settlement agreement between the United States and Turkey was meant to extinguish claims of former Ottoman subjects, including subjects who later became naturalized Armenian-Americans, was simply wrong.

A correspondence of April 4, 1933, by the U.S. Secretary of State to the American Chargé d’Affaires in Turkey, noted that “[a] survey made several months ago of the claims then [being processed by the Turkish-American Claims Commission] resulted in the rejection of a large group considered to be unsupportable.”¹⁴⁸ Two months later, on June 27, 1933, the Turkish Ministry of Foreign Affairs wrote to the U.S. Embassy in Turkey that the claims commission should only adjudicate

claims . . . made by American citizens the American nationality of whom is not contested and who have suffered injury in Turkey.

. . . .

In using the term “non-contested American nationality” this Ministry *intends to exclude* from the categories of American claimants individuals *who at the time of the injury for which they claim reparation were, according to Turkish law, Ottoman subjects*.¹⁴⁹

The newly-acquired American nationality of such individuals was to “be considered as null and void and he, himself, recognized as in the past a subject of the Ottoman Empire, shall under all circumstances be subject to the same treatment as is applied to subjects of the Ottoman

146. *Id.* at 1081.

147. *See id.* at 1079–85.

148. Ankara Agreement, *supra* note 143, at 895.

149. *Id.* at 901 (emphasis added).

Empire.”¹⁵⁰ And as such, those claims could not be “invoked against Turkey . . . [or] be heard by the Mixed Commission as an American claim.”¹⁵¹

These statements make clear that former Ottoman subjects who later became American nationals were not meant to be covered by the Ankara Agreement since they were treated, for the purposes of their claims, as Ottoman Turkish subjects.

Subsequent *travaux préparatoires* confirm this understanding. The original amount of total compensation estimated by the U.S. State Department to be obtained from Turkey was approximately \$5 million.¹⁵² In calculating that amount, the Americans had factored in the claims of “naturalized Americans.”¹⁵³ Turkey responded with a counter-proposal of \$500,000—a reduction which represented, in part, its view that “the claims of naturalized citizens of Ottoman origin” were not to be considered.¹⁵⁴ The United States had already anticipated this.¹⁵⁵

Settlement negotiations continued, and on March 11, 1934, the U.S. Ambassador received a note from the Turkish Foreign Ministry stating that “[m]y Government considers that in this second phase of the procedure the Commission would pronounce only upon claims of American citizens whose nationality is not contested and who have suffered loss in Turkey.”¹⁵⁶ By August 14, 1934,

[t]he Turkish Government ha[d] been notified that there [were] approximately 1900 claims of American citizens of Ottoman origin. The Turkish Foreign Office ha[d] through diplomatic channels informed the Government of the United States that the Turkish Government intended to exclude from the categories of American claimants persons who at the time of the injury for which they claim reparation were according to Turkish law Ottoman subjects. It was agreed in the Committee that, in connection with the negotiations for a lump sum settlement, the

150. *Id.* at 902.

151. *Id.*

152. *Id.* at 903.

153. *Id.* at 904.

154. *Id.* at 906.

155. *Id.* at 905 (statement by U.S. Ambassador to Turkey) (“It seems evident that if a careful examination were made of the claims, keeping in mind the questions of principle for which reservation has been made, the total of the claims would unquestionably be reduced to a very low figure.”).

156. *Id.* at 911–12.

legal issues involved in cases of this nature would not be discussed.¹⁵⁷

Thus, Turkey considered U.S. naturalized citizens to be citizens of Turkey, and did not agree to United States' espousal of those claims. Judge Morrow's conclusion, therefore, that Bakian's claims were extinguished by the Ankara Agreement is simply not supported by the negotiating history of this bilateral treaty. In fact, as the language of the negotiating history quoted above indicates, it appears that the claims of such claimants, either then or now, have never been extinguished. Last, Judge Morrow's reasoning in declaring California Civil Procedure Code section 354.45 unconstitutional, by interpreting the postwar agreements entered into by the United States with Germany and Turkey, is also circular. On the one hand, Judge Morrow noted that if the Berlin Treaty did not extinguish claims that section 354.45 resurrected, then the Ankara Treaty surely did so¹⁵⁸ (a point on which Judge Morrow and Judge Snyder appear to differ). On the other hand, she just as emphatically concluded that if the Ankara Treaty did not extinguish the claims, then the Berlin Treaty did.¹⁵⁹

After this loss before Judge Morrow, the tide of litigation for both plaintiff classes turned against them. From this point on, every one of Judge Morrow's rulings in this case went in favor of the German banks.

On March 23, 2008, plaintiffs filed a motion for class certification, which Judge Morrow denied on May 13, 2010.¹⁶⁰ Judge Morrow stated that a class must be ascertainable in order to qualify for certification.¹⁶¹ Further, she held that "a class is ascertainable if it is feasible for the court to determine whether a particular individual is a member."¹⁶² The question, therefore, became whether it was feasible for this court to identify U.S. residents who are the successors in interest of Armenians who deposited assets at Deutsche and Dresdner bank offices in Ottoman Turkey during the class period.¹⁶³

157. *Id.* at 920 (emphasis added).

158. *Deirmenjian II*, 526 F. Supp. 2d 1068, 1085 (C.D. Cal. 2007).

159. *Id.* at 1086–87.

160. Order Denying Plaintiffs' Motion for Class Certification and Motion for Leave to File a Third Amended Complaint at 3–4, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (RCx) (C.D. Cal. May 13, 2006).

161. *Id.* at 9.

162. *Id.* at 10 (internal citation omitted).

163. *Id.* at 17.

The plaintiffs contended that giving proper notice about the litigation would allow class members to find relevant information regarding their ancestors' bank accounts.¹⁶⁴ Under Federal Rule of Civil Procedure 23(d), Judge Morrow did allow the plaintiffs to engage in pre-certification communications with potential class members in order to find evidence of bank accounts.¹⁶⁵ After doing so, she held, however, that the evidence that the plaintiffs discovered through the pre-certification notices was insufficient to form an ascertainable class.¹⁶⁶ She explained that in making this determination, she took into account the fact that it was unlikely that the depositors and their heirs would have preserved any documentation of their accounts since most were killed or deported from Turkey and any record that the banks had were probably lost to history.¹⁶⁷ In effect, Judge Morrow was denying class certification to the genocide victim group because the members of the victim group had been victims of a genocide.

On June 21, 2010, the defendant German banks, on the heels of their class certification victory, filed a motion for summary judgment seeking to have Judge Morrow dismiss the entire case without a trial. On July 30, Judge Morrow granted that motion.¹⁶⁸ Before doing so, and in response to the defendant banks' motion, Judge Morrow held that in order to avoid the grant of summary judgment, the plaintiffs needed to file a statement setting forth the existence of a genuine issue necessary to be litigated.¹⁶⁹ Further, Judge Morrow stated that the failure to offer such a statement constitutes a waiver of claims.¹⁷⁰ Judge Morrow then held that Khachik Berian was the only plaintiff, out of the seven, to state a genuine issue of material fact.¹⁷¹ Accordingly, the court held that the failure of the other plaintiffs "to offer any argument or evidence in opposition to the defendants' motion constitutes abandonment of their claims, and summary judgment is properly entered in [the defendants'] favor."¹⁷² As to the only remaining plaintiff, Khachik Berian, his claim¹⁷³

164. *Id.* at 20.

165. *Id.* at 21 (acknowledging that the court followed FED. R. CIV. P. 23(d)).

166. Order Denying Plaintiffs' Motion for Class Certification, *supra* note 160, at 26–27.

167. *Id.* at 28–29.

168. *Deirmenjian III*, No. CV 06-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957, at *77 (C.D. Cal. July 30, 2010).

169. *Id.* at *26–32.

170. *Id.*

171. *Id.* at *26.

172. *Id.* at *26, *28.

was dismissed pursuant to Judge Morrow's new holding that California's statute of limitations did not apply in this matter. As discussed above, Judge Morrow specifically held in 2006 that the deposited-assets claims of Class A plaintiffs like Berian were not time-barred because California Code of Civil Procedure section 348 states that there is no limitations period on any "actions brought to recover money or other property deposited with any bank."¹⁷⁴ In this case, Berian's action sought to recover funds deposited by his Armenian ancestors with Deutsche Bank.¹⁷⁵ In contrast to her earlier decision in 2006, Judge Morrow now held in 2010 that California Code of Civil Procedure section 348 was indeed *not* the correct statute to be used to determine the limitations

173. Plaintiff Khachik Berian is the grandson and a surviving heir of Hatchik Berberian, "a well-to-do Armenian lawyer who lived in Ottoman Turkey." Opening Brief of Appellant Khachik Berian at 9, *Deirmenjian v. Deutsche Bank, A.G.*, No. 10-56359 (9th Cir. Feb. 7, 2011). Attorney Berberian allegedly maintained a bank account with the Constantinople branch of Deutsche Bank. *Id.* As a result of the genocide, Berberian fled to Greece with his wife and three children: two teenage sons, Levon and Aram, and a younger daughter, Zabelle. *Id.* at 9-10. Forty-eight other members of the Berberian family did not survive. *Id.* at 10.

Fleeing Ottoman Turkey, Attorney Berberian was forced to leave his property behind but did take with him correspondence with the Constantinople branch of Deutsche Bank. *Id.* These letters, dated from September 1914 through November 1915, confirm the existence in the name of Berberian of (1) an account with Deutsche Bank in Constantinople; (2) the amounts on deposit; and (3) the interest rate on the deposited funds. *Id.* Attorney Berberian died intestate in Greece some time before 1930, and his two sons, Levon and Aram, subsequently immigrated to Iran. *Id.* Khachik Berian, born in Iran and currently residing in California, is Aram's son and along with his sister Magdalen are the only surviving heirs of Attorney Berberian. *Id.* at 10-11. They are in possession of the correspondence from Deutsche Bank, passed down from their grandfather to their uncle Levon. *Id.* at 16-17. Berian and his sister discovered the bank documents in December 2008 after Levon's wife, Allene, died. *Id.* at 11 n.6, 17. The Deutsche Bank documents were found in a drawer in their home in New Jersey. *Id.* Because Levon and Allene had no children, their nephew and niece, Berian and his sister Magdalen, remain the sole surviving heirs of this family. *Id.* at 11. In February 2009, two months after discovery of the Deutsche Bank documents, Berian joined the *Deirmenjian v. Deutsche Bank, AG* lawsuit. *Id.* at 6. Deutsche Bank has no existing records of any deposits in its Constantinople branch, since those records were destroyed in the 1970s. *Id.* All of the above information is taken from the Excerpt of the Record filed by plaintiff/appellant Berian before the Ninth Circuit.

174. *Deirmenjian I*, No. CV 06-00774 MMM (CWx), 2006 U.S. Dist. LEXIS 96772, at *132-33 (C.D. Cal. Sept. 11, 2006) (citing and quoting CAL. CIV. PROC. CODE § 348 (West 2006)).

175. In the 2010 Order denying class action certification, Judge Morrow originally ruled that Berian lacked standing to bring a claim; thereafter, Berian produced additional evidence squarely addressing Judge Morrow's concerns regarding standing, and the district court allowed his claim to proceed. Order Denying Plaintiff's Motion for Class Certification and Motion for Leave to File a Third Amended Complaint at 3, *Deirmenjian v. Deutsche Bank, A.G.*, No. 06-00774 MMM (RCx) (C.D. Cal. May 13, 2010).

period for Berian's action. Instead, she now held that under California's choice-of-law analysis, the Turkish statute of limitations should be applied.

Deirmenjian v. Deutsche Bank AG, which Berian later joined and currently remains the sole named class representative, was originally filed in California state court but then removed to federal court based on diversity jurisdiction.¹⁷⁶ As a result, Judge Morrow reasoned that California choice-of-law rules necessarily applied.¹⁷⁷ Judge Morrow then analyzed the choice-of-law issue by using the "governmental interest analysis" set forth by the California Supreme Court in a new decision issued in 2010: *McCann v. Foster Wheeler LLC*.¹⁷⁸

Applying the three-step governmental interest analysis of *McCann*, Judge Morrow found that: (1) there was a significant difference between California and either Turkish or German law because the "no limitations period for bank claims" and California's delayed discovery rule (both of which may have saved the Deirmenjian and Berian claims) existed only under California law; (2) in analyzing each jurisdiction's interest in the application of its own law, the judge held that California courts have consistently declined to recognize after-acquired residence as a source of governmental interest and that Turkey and Germany had significant interests in regulating banks headquartered in their borders; and, most critical, (3) California's interest in the case was subordinate to Turkey's interest in the acts giving rise to the Deirmenjian and Berian claims because the acts occurred in Turkish territory.¹⁷⁹ Thus, Judge Morrow concluded that Turkey's prescription statute of ten years for bank claims was indeed the statute to be applied in this suit, and, thus, barred the plaintiffs' claims.¹⁸⁰

176. *Deirmenjian III*, 2010 U.S. Dist. LEXIS 86957, at *3, *37.

177. *Id.* at *37.

178. *Id.* at *35–75 (analyzing *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010)). In *McCann*, the California Supreme Court had to decide whether, under a governmental interest analysis, the California statute of limitations or the Oklahoma statute of limitations should apply. *McCann*, 225 P.3d at 519, 522. Plaintiff, suffering from mesothelioma alleged to have come from exposure to asbestos from boilers manufactured by defendant, filed suit for personal injury. *Id.* at 518. The California Court of Appeal judgment finding that California law applied to the case was reversed by the California Supreme Court because, under the supreme court's governmental interest analysis, Oklahoma's interest would be more impaired than California's interest if Oklahoma's laws were not applied under the circumstances of the case. *Id.* at 537.

179. *Deirmenjian III*, 2010 U.S. Dist. LEXIS 86957, at *51–55, *60–63.

180. *Id.* at *60–61.

In reaching this conclusion, Judge Morrow, however, failed to take into account that there is a stark contrast between the facts that were before the court in *Deirmenjian*, involving losses from a mass atrocity, and the facts in *McCann*, involving a garden-variety personal injury case. In the Armenian Genocide context there is abundant evidence of Turkey's unwillingness, from the time of the Armenian Genocide until the present day, to address or even consider claims made by Armenians for material losses arising out of that genocide. Turkish law makes it impossible for any Armenian Genocide heir to seek damages for losses under its domestic law, and no claimant has ever obtained compensation in Turkey for such losses.¹⁸¹ Finally, not only has Turkey long refused to acknowledge the Armenian Genocide, but the mere public mention of the genocide, or any reference to the fate of the Armenians in Turkey between 1915 and 1923 as constituting a genocide, can subject that speaker to criminal prosecution for the crime of insulting the Turkish nation.¹⁸²

In this context, therefore, Judge Morrow's comparison of the choice-of-law issue in the Armenian Genocide-era claims setting to the garden variety, sister-state choice-of-law issue in *McCann* simply makes no sense. In fact, the California Supreme Court specifically held in *McCann* that the foreign jurisdiction's interest (in that case, that of a sister-state, Oklahoma) must be considered in light of the application of its "own law to the case at hand."¹⁸³ But Judge Morrow failed to consider this. Judge Morrow's holding, if allowed to stand, has far-reaching implications because the application of a Turkish statute of limitations

181. *See id.*

182. Turkish Penal Code Section 301, in effect since 2005 and amended in 2008, states the following:

1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey, shall be punishable by imprisonment of between six months and three years.

2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security organizations shall be punishable by imprisonment of between six months and two years.

3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.

4. Expressions of thought intended to criticize shall not constitute crime.

Id. For a general discussion of Section 301, see Jahnisa Tate, Note, *Turkey's Article 301: A Legitimate Tool For Maintaining Order or a Threat to Freedom of Expression?*, 37 GA. J. INT'L & COMP. L. 181 (2008).

183. *McCann*, 225 P.3d at 523 (emphasis added).

period for any Armenian Genocide-era restitution claim will necessarily act as a bar to that claim. The 2010 *Deirmenjian* holding stands for the proposition that even if Armenian Genocide claims are not time-barred under California's statute of limitations, such claims would nonetheless be barred by the courts' application of Turkey's statute of limitations. Given that defendants often raise a statute of limitations defense on a motion to dismiss or demurrer, defendants in any future action in the United States arising out of material losses from the Armenian Genocide are likely to raise these arguments at the pleading stage and stand a good chance to have the case dismissed if Judge Morrow's conclusion that the Turkish prescription period applied.

On August 27, 2010, Berian (both on his own behalf and on behalf of the Class A plaintiffs similarly situated) filed an appeal before the Ninth Circuit Court of Appeals seeking to have Judge Morrow's ruling that the Turkish limitations period applies to Armenian Genocide-era claims overturned.¹⁸⁴ As of this writing, the appeal has yet to be considered.

IV. TURKISH FOREIGN SOVEREIGN IMMUNITY FROM CLAIMS IN THE UNITED STATES

As the previous discussion demonstrates, filing Armenian Genocide-era suits in American courts presents a number of significant legal obstacles. Nevertheless, such suits will not necessarily end in failure. The successful settlements in the Armenian insurance litigation provide both important inspiration and significant legal precedent for suits against other insurers that might have sold policies to Armenians in Ottoman Turkey and that did not fully pay out these policies. The 2010 decision of the Ninth Circuit in *Movsesian II* upholding a California state statute recognizing Armenian Genocide-era restitution claims goes beyond just recognizing such claims for insurance. Invariably, other Armenian Genocide-era losses, including claims for theft of cultural property, can be given momentum through similar state laws recognizing such claims.

184. See Opening Brief of Appellant Khachik Berian, *supra* note 173, at 1–2 (explaining that Berian only appealed the judgment against Deutsche Bank because this is the bank where his ancestors allegedly deposited funds in Ottoman Turkey). Defendant Dresdner Bank, therefore, is no longer a party on the appeal. *Id.* Additionally, since no Class B plaintiff (representing the looted assets claims) filed an appeal, those claims also are not before the Ninth Circuit. *See id.*

While for now the German banks litigation has been dismissed, the ruling in *Movsesian II*, which recognized the constitutionality of California Code of Civil Procedure section 354.4, portends that Judge Morrow's decision will be reversed on appeal by the Ninth Circuit. California Code of Civil Procedure section 354.4 allows for the extension of the statute of limitations for insurance claims resulting from the Armenian Genocide.¹⁸⁵ Section 354.45, which Judge Morrow ruled unconstitutional, contains the exact same statutory language as section 354.4.¹⁸⁶ The only difference in the statutory language is that section 354.4 allows claims against insurance companies, while section 354.45 allows claims against banks.¹⁸⁷ This subtle difference is inconsequential, and, accordingly, the ruling of constitutionality of section 354.4 by the Ninth Circuit in *Movsesian II* appears to trump the ruling of the district court on the constitutionality of section 354.45 by Judge Morrow.

The next step in the Armenian Genocide litigation would be the filing of a suit against the Republic of Turkey and its state-owned businesses for profiting from the Armenian Genocide. In any such suit, Turkey and its state-owned entities are bound to raise the same defenses already raised by the insurance companies and the German banks. These include (1) forum non conveniens; (2) act of state and political question doctrines; and (3) statute of limitations. The partly successful parrying of these defenses by the Armenian plaintiffs in the litigation to date demonstrates that Turkey and its state-owned entities, when sued for acts arising out of the Armenian Genocide, will not necessarily prevail upon assertion of these defenses.

Turkey and its political subdivisions, and agencies and instrumentalities, however, possess one additional defense not available to the private defendants already sued: foreign sovereign immunity. The remaining sections will discuss this defense and how to confront it.

A. Foreign Sovereign Immunity as a Bar to a Suit Against Turkey

Whenever foreign states are sued in the United States they inevitably assert that the doctrine of sovereign immunity protects them

185. See *supra* note 41 and accompanying text.

186. Compare CAL. CIV. PROC. CODE § 354.4 (West 2006), with CAL. CIV. PROC. CODE § 354.45 (West 2006) (showing that these statutes contain the same language, differing only in regard to allowing litigation against banks versus insurance companies).

187. CAL. CIV. PROC. CODE §§ 354.4(b), 354.45(b).

from such litigation.¹⁸⁸ Up until 1952, courts in the United States adhered to an *absolute* view of sovereign immunity under which a foreign state enjoyed immunity from *all* suits in United States federal courts.¹⁸⁹ In 1952, however, the acting Legal Adviser of the State Department, Jack Tate, sent a letter to the acting Attorney General announcing that the State Department was adopting a more restrictive principle of foreign sovereign immunity.¹⁹⁰ Under the restrictive principle, the immunity of a foreign sovereign would be recognized with regard to a sovereign's "public" acts, but would not be recognized with respect to a sovereign's "private" acts.¹⁹¹ Restrictive sovereign immunity acknowledges that not all acts of a state are sovereign in nature: the state may be acting akin to that of a commercial enterprise, and in such instances, immunity to suits based on such private acts should not be recognized.¹⁹²

188. See BORN & RUTLEDGE, *supra* note 14, at 219 (explaining that the United States recognizes that "foreign states and state-related entities enjoy important immunities from the judicial jurisdiction of national courts"). "Issues of foreign sovereign immunity arise with considerable frequency in contemporary international litigation. This is because of the extensive involvement of foreign governments and their agencies—including airlines, banks, shipping lines, and other 'commercial' entities—in international trade and finance." *Id.*

189. See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–87 (1983) (providing a brief history of foreign sovereign immunity claims in the United States); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (finding a French vessel immune from the jurisdiction of U.S. courts).

190. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Phillip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in *Change of Policy on Sovereign Immunity of Foreign Governments*, 26 DEP'T ST. BULL. 984, 984–85 (1952); see also *Verlinden*, 461 U.S. at 487 & n.9 (highlighting the letter).

191. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) (referring to sovereign public acts as *jure imperii* of a state, and sovereign private acts as *jure gestionis*).

192. BORN & RUTLEDGE, *supra* note 14, at 259. Born and Rutledge explain as follows:

As recounted in the Tate Letter, the increase in the trading activities of foreign governmental entities was central to the development of the restrictive theory of sovereign immunity. Consistent with these developments, § 1605(a)(2) of the FSIA denies immunity to certain commercial activities of foreign states. This is the single most important exception to foreign sovereign immunity in the United States.

Id.; see also 28 U.S.C. § 1605(a) (2006). Section 1605(a) reads, in part, as follows:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of

Though the Tate Letter provided a new perspective by which to utilize the concept of foreign sovereign immunity, “it did not provide courts with concrete legislative standards for determining” when the restrictive view of sovereign immunity should be adopted.¹⁹³ This lack of a clear judicial standard led Congress in 1976 to adopt the Foreign Sovereign Immunities Act (FSIA).

B. The Applicability of FSIA and Its Exceptions to Events Arising out of the Armenian Genocide

Any discussion of the utilization of foreign sovereign immunity by a foreign defendant being sued in American courts must begin with the language of FSIA. After years of finding foreign sovereigns absolutely immune from suit in the United States and giving the Executive Branch, through the State Department, the ability to carve out case-by-case exceptions to such immunity, Congress decided in 1976 that “the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.”¹⁹⁴ As a result, Congress enacted FSIA to provide judicial standards needed to litigate a foreign sovereign’s claim to immunity from possible lawsuits in the United States.¹⁹⁵ Entities entitled to immunity from suits—and subject to FSIA’s enumerated

the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

§ 1605(a)(1)–(3).

193. *Siderman*, 965 F.2d at 705.

194. 28 U.S.C. § 1602.

195. *Id.*

exceptions—are (1) the foreign state itself; (2) its political subdivisions; and (3) its agencies or instrumentalities.¹⁹⁶

The statute begins by making foreign sovereign immunity the presumptive standard, and then provides that such immunity will be subject to a list of exceptions laid out in subsequent code sections.¹⁹⁷ For purposes of litigation against Turkey, the only relevant exceptions are (1) the “commercial activity” exception, and (2) the “takings” exception.¹⁹⁸

One may rightly first ask, however, why FSIA and its exceptions should be applied to acts that took place before the Act’s enactment in 1976. Turkey’s initial immunity argument, therefore, will be that FSIA is not even applicable to a suit based upon acts taking place during the Armenian Genocide, years before FSIA and its restrictive theory became federal law. Here, however, the Holocaust restitution litigation provides an important precedent to successfully defeat this argument.

In 2004, the United States Supreme Court accepted an appeal of a Nazi looted-art case, *Republic of Austria v. Altmann*,¹⁹⁹ specifically to address the issue of the retroactivity of FSIA. In *Altmann*, the defendant, the Republic of Austria, argued that it was entitled to absolute sovereign immunity under pre-1976 law because the artworks sought by Holocaust survivor and Los Angeles resident Maria Altmann from Austria had all been allegedly taken during the Nazi era.²⁰⁰ The

196. See 28 U.S.C. § 1603. The three classes of foreign sovereign defendants are set out as follows:

For purposes of [FSIA]—

(a) A “foreign state” . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

Id. § 1603(a)–(b).

197. 28 U.S.C. § 1604.

198. See 28 U.S.C. § 1605(a)(1)–(3).

199. (*Altmann III*), 541 U.S. 677, 700 (2004).

200. *Id.* at 686. “[T]hey claimed that as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute immunity from suit in United States courts.

Supreme Court held otherwise, finding that when Congress enacted FSIA it envisioned its application to all suits filed after the passage of the law, even if the suit against the foreign state was based on wrongful conduct that took place before 1976.²⁰¹ The *Altmann* decision, therefore, opened up an entire category of suits against foreign sovereigns for acts that took place years ago, even those going back to the beginning of the twentieth century.

The applicability of FSIA and its exceptions to pre-enactment conduct means that Turkey will not succeed in arguing that it possesses absolute sovereign immunity to acts arising out of the Armenian Genocide. Any Armenian plaintiff who wishes to defeat an assertion of sovereign immunity by Turkey need fit his or her particular factual situation into only one or more of the enumerated exceptions to FSIA in order to establish the jurisdiction of a U.S. court over the claim.

1. The “Commercial Activities” Exception

FSIA states that a foreign state will not be able to claim sovereign immunity in any case where

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.²⁰²

This exception would match up with a Turkish-owned commercial enterprise currently doing business in the United States and that was in existence during the time of the Armenian Genocide and actively participated in profiting from assets stolen from Armenian citizens during that time.

Case law further explains that, regardless of the motive behind a particular activity, that activity will be deemed “commercial” if it is the

Proceeding from this premise, petitioners next contended that nothing in the FSIA should be understood to divest them of that immunity retroactively.” *Id.*

201. *Id.* at 686–87.

202. 28 U.S.C. § 1605(a)(2).

type through which a private party engages in trade or commerce.²⁰³ An Armenian plaintiff must distinguish governmental, public, or sovereign enterprises (e.g., providing national defense, or running police departments or parks) from the disputed Turkish acts or acts of agencies or instrumentalities in what would be deemed commercial capacity (e.g., operating banks, hotels, or cruise ships).

Once an Armenian plaintiff is able to establish that the Turkish government, or its agency or instrumentality, has engaged in commercial activity, that plaintiff will then be required to establish a nexus between the disputed commercial activity and the plaintiff's grievance.²⁰⁴ This is needed as the language of the statute requires a causal showing that the claim is "based upon" commercial activity by a foreign sovereign.²⁰⁵ As such, the plaintiff would have to show that, but for the commercial actions of Turkey, or its agency or instrumentality, the plaintiff's claim would not have arisen.

This is usually the most difficult step for plaintiffs suing a foreign state for human rights abuses and seeking to use the commercial activity exception as the basis of jurisdiction because the human rights victim is required to show that his or her suit is, in fact, based upon the commercial activity of the foreign state. In *Saudi Arabia v. Nelson*,²⁰⁶ Scott Nelson, an American citizen, was hired to work in Saudi Arabia as an engineer at a state-owned hospital.²⁰⁷ While there, he was arrested, and before being released and allowed to return to the United States, he was allegedly tortured and he suffered other brutal mistreatment at the hands of Saudi prison officials.²⁰⁸ In his personal injury lawsuit, the Supreme Court ultimately held that the suit was barred under FSIA.²⁰⁹ Nelson's reliance on the commercial activity exception was misplaced, said the Court, reasoning that his suit was based upon the injuries inflicted upon him by the Saudi prison authorities—an essentially sovereign activity—and not upon the commercial activity of being hired

203. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *Sun v. Taiwan*, 201 F.3d 1105, 1107 (9th Cir. 2000); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 313 (D.D.C. 2005).

204. *See Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 (7th Cir. 1991) (highlighting the nexus requirement).

205. 28 U.S.C. § 1605(a)(2).

206. 507 U.S. 349 (1993).

207. *Id.* at 351–52.

208. *Id.* at 353.

209. *Id.* at 351.

in the United States to work in Saudi Arabia.²¹⁰ The commercial activity, while present in the case, was only tangential to the actual basis of the lawsuit: abuse inflicted by Saudi government officials.²¹¹ The *Nelson* case, therefore, presents a severe restriction upon the use of the commercial activity exception in suits against foreign states for human-rights wrongs.

However, since the contemplated suits against Turkey and its state-owned commercial enterprises focus on property losses arising out of the Armenian Genocide and the subsequent use of such property by defendants to generate profits in the United States, the based-upon requirement of the commercial activity exception may be met in such suits. An Armenian plaintiff would have to show that Turkey's current commercial activities in the United States are somehow materially related to the activities that form the basis of the plaintiff's claim arising out of the Armenian Genocide. For example, if an Armenian plaintiff were to bring a claim against a Turkish-owned bank that operated in Turkey during the Armenian Genocide and had acquired the plaintiff's ancestor's stolen assets, and that bank currently does business in the United States with some of those assets, this may satisfy the commercial activity exception's nexus requirement stipulated in section 1605(a)(2).

2. The "Takings" Exception

FSIA further states that a foreign state will not be able to claim sovereign immunity in any case where

rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.²¹²

210. *Id.* at 361–63.

211. *See id.* at 362–63.

212. 28 U.S.C. § 1605(a)(3).

FSIA divides this exception into several parts, making several requirements necessary to successfully implement it against the assertion of foreign sovereign immunity. If the lawsuit is against the foreign state, the requirements are (1) property, or rights in property, must have been taken in violation of international law; and (2) that property, or any property exchanged for such property, is in the United States in connection with commercial activity carried on by a foreign state in the United States.²¹³ If the lawsuit is against an agency or instrumentality of the foreign state—in essence, a state-owned enterprise—then the illegally-taken property (1) must be shown to be currently owned or operated by an agency or instrumentality of a foreign state; and (2) that agency or instrumentality is engaged in commercial activity in the United States.²¹⁴

Again, Holocaust restitution suits provide helpful precedent to the Armenian plaintiff seeking to rely on the takings exception. In *Altmann v. Republic of Austria*, the plaintiff instituted a claim for six paintings that were the property of her uncle before the Nazis took the paintings

213. *Id.*

214. *Id.*; see also 28 U.S.C. § 1603(a)–(e) (2006). Definitions of the terms “agency or instrumentality of a foreign state” and “commercial activity” are found in section 1603:

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The “United States” includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

Id. § 1603(a)–(e).

in Austria in 1938.²¹⁵ Though the paintings all went through various channels, they all eventually ended up in the possession of the Austrian National Art Gallery (Gallery), an agency or instrumentality of Austria, which refused to return the paintings to the plaintiff.²¹⁶ The plaintiff then sought to recover the paintings under the takings exception to FSIA.²¹⁷

The Central District of California enumerated three distinct requirements in order to substantiate a valid taking under international law: “First, the taking must serve a public purpose; second, aliens [whose property is taken] must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made.”²¹⁸ In *Altmann*, the plaintiff illustrated that the taking of the art by the Nazis discriminated against Jews and that the art was taken without just compensation.²¹⁹

The Gallery attempted to combat this assertion by stating that “[a] plaintiff cannot complain that a taking has not been fairly compensated unless the plaintiff has first pursued and exhausted the domestic remedies in the foreign state that is alleged to have caused the injury.”²²⁰ However, as the court pointed out, if the “domestic remedies are a sham, are inadequate, or would be unreasonably prolonged,” the exhaustion requirement is excused.²²¹ In the *Altmann* litigation, the

215. *Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1192–93 (C.D. Cal. 2001).

216. *Id.* at 1194–96.

217. *Id.* at 1202–03.

218. *Id.* at 1202 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711–12 (9th Cir. 1992)).

219. *Id.* at 1203.

220. *Id.* (citing *Greenpeace, Inc. v. France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996)).

221. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 (1986)). *The Restatement* provides the following:

(1) A state whose national has suffered injury under § 711 or § 712 has, as against the state responsible for the injury, the remedies generally available between states for violation of customary law, § 902, as well as any special remedies provided by any international agreement applicable between the two states.

(2) A person of foreign nationality injured by a violation of § 711 or § 712 may pursue any remedy provided by

(a) international agreement between the person’s state of nationality and the state responsible for the injury;

(b) the law of the state responsible for the injury,

(c) the law of another state, or

remedies available in Austria for the plaintiff were deemed inadequate due to the fact her claim would be barred by the statute of limitations, as well as the fact that her filing fees would be between \$130,000 and \$200,000, which were egregious and unreasonable fees by the court's estimation.²²²

Altmann makes clear the course, under the first prong, for a potential Armenian plaintiff against Turkey, or its agency or instrumentality. Initially, a plaintiff must establish a non-frivolous claim of a taking through the elements enumerated. For example, if real or personal property was taken from an Armenian plaintiff's ancestors during the time of the Armenian Genocide and just compensation was not paid for such property, the jurisdictional requirements laid out by the U.S. court under *Altmann* would be satisfied. Next, the plaintiff must establish that the remedies available for the claim in Turkey are non-existent.²²³ Since Turkey does not even recognize the Armenian Genocide as having happened, and will therefore not likely recognize any claims arising from the genocide, no remedy exists for the plaintiff by filing suit in Turkey.

Finally, the plaintiff must show that the Turkish, state-owned institution or enterprise engages in commercial activity in the United States. "Commercial activity" is defined by FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act."²²⁴ Noteworthy in the second clause of the exception, is that the defendant Turkish institution or enterprise need not engage in United

(d) agreement between the person injured and the state responsible for the injury.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713.

222. *Altmann I*, 142 F. Supp. 2d at 1209–10.

223. *See id.* at 1203. *See also Piper Aircraft Co. v. Reyno*, where the Court provided as follows:

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. . . . [H]owever, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

454 U.S. 235, 254 n.22 (1981) (internal citations omitted).

224. *See supra* note 214 (showing, *inter alia*, the elements and definitions of "commercial activity" by a "foreign state").

States-based commercial activities with the looted property.²²⁵ Unlike a suit undertaken against a foreign state pursuant to the first clause of the taking exception or the commercial activity exception with its based-upon requirement, no nexus is required in suits asserting loss of property claims against state-owned defendants and their commercial activities in the United States. As long as that entity (1) owns or operates the looted property and (2) does business in the United States, with the looted property *or otherwise*, it is subject to suit in American courts.²²⁶ In *Altmann*, for instance, the Austrian Gallery that displayed the looted Klimt artworks in its museum published a book, *Klimt's Women*, with Yale University Press in the United States, and this book was viewed as further promoting within the United States the Gallery's collection in Austria, including the looted paintings.²²⁷ As explained by the federal judge hearing the case, the plaintiff's allegations establishing commercial activities in the United States included that

the Gallery publishes a museum guidebook in English available for purchase by United States citizens, including those in the Central District [of California, the site of the lawsuit], and the Gallery's collection, including the paintings at issue in this action, is advertised in the United States, including in the Central District. Moreover, the Gallery is visited by thousands of United States citizens each year, including United States citizens that reside in the Central District. Additionally, the Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.²²⁸

The court found sufficient commercial activities by the Gallery in the United States and thus applied the takings exception to combat the claim of sovereign immunity.²²⁹ On appeal, the Ninth Circuit agreed: "Because Appellants profit from the Klimt paintings in the United

225. See *supra* note 214. 28 U.S.C. § 1605(a)(3) (2006) allows an exception to foreign sovereign immunity for "any property exchanged for such property [that] is owned or operated by an agency or instrumentality of the foreign state and [when] that agency or instrumentality is engaged in a commercial activity in the United States." This section eliminates the need for the agency or instrumentality to be engaged in commercial activity with the property that was taken.

226. See *supra* note 192 accompanying text (explaining this requirement under 28 U.S.C. § 1605(a)(3) (2006)).

227. *Altmann v. Republic of Austria (Altmann II)*, 317 F.3d 954, 969 (9th Cir. 2002).

228. *Altmann I*, 142 F. Supp. 2d at 1204–05.

229. *Id.* at 1205–06.

States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute ‘commercial activity’ for the purpose of satisfying FSIA, as well as the predicates for personal jurisdiction.”²³⁰

The above statements, tying the looted property to the Austrian museum’s United States-based commercial activities, can be misleading. As noted above, under the second clause of section 1605(a)(3) dealing with sovereign agencies and instrumentalities—as opposed to the first clause dealing with the immunity of the foreign state itself—any commercial activity of the Gallery in the United States would have been sufficient to deny it sovereign immunity. Though both the district court and the Ninth Circuit in *Altmann* found that the Austrian state-owned museum did use the looted Klimt paintings in their United States-based commercial activities, the plain language of the second clause does not make this a requirement to deny foreign sovereign immunity.²³¹

In *Cassirer v. Kingdom of Spain*, a federal trial judge in Los Angeles, deciding whether the court had jurisdiction over Spain in a suit seeking the return of a Nazi-looted artwork, followed the reasoning in *Altmann*.²³² The plaintiff sought “to recover from the Kingdom of Spain . . . and the state-owned Thyssen–Bornemisza Collection Foundation (the “Foundation”) a painting by Camille Pissaro that the Nazis extorted from his grandmother in 1939 as a condition to issuing her an exit visa.”²³³ After changing hands numerous times, the painting ended up being purchased by the Foundation from Baron Thyssen–Bornemisza, along with the rest of the Baron’s art collection, for \$327 million.²³⁴ In the *Cassirer* suit, the federal trial judge found that the defendant, a Spanish art foundation, like the Austrian Gallery in *Altmann*, had engaged in commercial activity in the United States.²³⁵

The case was appealed and four years later the Ninth Circuit, sitting en banc, agreed, stating, “The Foundation, which claims to own the Pissarro that was taken from Cassirer’s grandmother, has engaged in various activities in the United States—some of which relate to the painting and encourage Americans to visit the museum—that show a

230. *Altmann II*, 317 F.3d at 959.

231. See *supra* notes 227–28 and accompanying text.

232. 461 F. Supp. 2d 1157, 1161, 1165, 1172 (C.D. Cal. 2006).

233. *Id.* at 1161.

234. *Id.*

235. *Id.* at 1170–72.

commercial activity for purposes of section 1605(a)(3).”²³⁶ The *Cassirer* appellate court explicitly stated that, as § 1603(d) provides, “The commercial character of an activity shall be determined by reference to the nature of the conduct or particular transaction or act, rather than by reference to its purpose.”²³⁷ Thus, it does not matter that the Foundation’s activities are undertaken on behalf of a non-profit museum to further its cultural mission. “The important thing is that the actions are ‘the *type* of actions by which a private party engages in trade and traffic or commerce.’”²³⁸ Thus, the primary inquiry is whether a private party may engage in the type of activity at issue.²³⁹ The appellate court then turned to the *Siderman* and *Altmann* cases as examples, showing that “commercial activity” is merely a jurisdictional issue:

We have considered the question before. In *Siderman*, we concluded that the Sidermans’ allegations concerning Argentina’s solicitation and entertainment of American guests at an expropriated hotel and the hotel’s acceptance of American credit cards and traveler’s checks were sufficient at the jurisdictional stage to show that Argentina was engaged in a commercial activity in the United States. In *Altmann*, we likewise held that the Gallery, which was an instrumentality of the Austrian government and owned the Klimt paintings allegedly confiscated from the plaintiff’s family, engaged in a commercial activity in the United States. This was based on allegations (assumed to be true) that the Gallery authored, edited and published in the United States a book about the women in Klimt paintings and a guidebook with photographs of the stolen paintings; and it advertised Gallery exhibitions in this country. The publication and sale of these materials, and marketing of a Klimt exhibition in the United States, were commercial activities in themselves, and also were a means of attracting Americans to the Gallery.

Here, the Foundation has had many contacts with the United States, including some that encourage Americans to visit the

236. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010).

237. *Id.* at 1027.

238. *Id.* at 1032 (citing and quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

239. *Id.* (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992) (quoting *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987))).

museum where the Pissarro is featured, and some that relate to the painting itself. . . . [W]e cannot say its endeavors fall short of being a commercial activity for jurisdictional purposes under the second prong of § 1605(a)(3).²⁴⁰

It bears repeating here also, that while the Ninth Circuit found in *Cassirer* that some of the United States-based commercial activities of the Foundation “relate to the painting itself,” this fact is superfluous. The mere fact that the Foundation holds the painting taken in violation of international law (even if in Spain) and at the same time conducts commercial activities in the United States was enough to deny the Foundation sovereign immunity to the suit.

For purposes of an Armenian suit against an agency or instrumentality of Turkey, a plaintiff would merely have to show the existence of some sort of commercial activity by that Turkish agency or instrumentality in the United States of the kind shown by the plaintiffs in *Altmann* and *Cassirer*. To emphasize, the commercial activity in the United States of the Turkish-owned entity need not be extensive and can be wholly unconnected with the actual theft taken against that Armenian plaintiff’s ancestor during the Armenian Genocide. For example, if a plaintiff could show that a Turkish-owned bank had, during the Genocide, seized or participated in the seizure of, moneys deposited by an Armenian ancestor of the plaintiff, or had profited from looted assets stolen from the Armenian victims, and if the plaintiff could further show that the bank does business in the United States by such acts as U.S.-based currency exchanges or advertising, then that Turkish agency or instrumentality would be subject to the jurisdiction of an American court. This is wholly different from the more rigid requirement of the commercial activities exception where the actual commercial activity of the defendant must be the basis of the lawsuit.²⁴¹

In *Cassirer*, Spain and its Foundation raised a number of rebuttal arguments that further elucidate the potential issues in an Armenian Genocide-based lawsuit against a Turkish entity. One such relevant argument was Spain’s assertion that the taking was not “in violation of

240. *Id.* at 1033–34 (internal citations omitted).

241. *Id.* at 1033. “The Foundation faults the district court for having failed to require a nexus between the activity and the lawsuit, as well as a quantum of activity that has a substantial connection with the United States.” *Id.* The court clearly states, however, that the nexus requirement is not required within the meaning of the “takings exception.” *Id.*

international law” since Cassirer’s grandmother from whom the painting was looted was a German national and, as such, a taking by the Nazi German state from its own national did not implicate violations of international law.²⁴² However, the court accepted plaintiff’s compelling evidence that Jews in Nazi Germany were not viewed as citizens at that time.²⁴³ As such, the court concluded that the plaintiff’s grandmother’s citizenship did not preclude the plaintiff from utilizing the exception:

The issue regarding the applicability of this exception arises because the statute uses the passive voice and does not expressly require that the foreign state (against whom the claim is made) be the entity that took the property in violation of international law. Appellants invite us to read such a requirement into the statute. The parties agree that Germany, and not Spain, allegedly took the Painting in violation of international law. Therefore, under the construction urged by Appellants, the expropriation exception could not apply. We disagree.²⁴⁴

In the case of a plaintiff bringing a claim against Turkey for taking of property of his or her Armenian ancestor arising out of the Armenian Genocide, this particular element in *Cassirer* and *Altmann* may prove to be a bit more difficult. In *Altmann*, the court specifically enumerated that “in order to fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.”²⁴⁵ In these cases, citizenship was a non-issue since the immediate victim of the looting in *Altmann* was a Czech citizen,²⁴⁶ and *Cassirer* provided evidence that Jewish people were not considered citizens in Nazi Germany.²⁴⁷

242. *Id.* at 1024 (explaining this argument from previous rulings and dismissing it on the grounds that Spain need not be the entity who took the property).

243. *Id.* at 1023.

244. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1056 (9th Cir. 2009), *rev’d on rehearing en banc*, 616 F.3d 1019 (9th Cir. 2010).

245. *Altmann II*, 317 F.3d 954, 968 (9th Cir. 2002) (internal quotations omitted).

246. *Id.*

247. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d at 1157, 1165 (C.D. Cal. 2006).

At first glance, Armenian citizens of Ottoman Turkey have no recourse against this citizenship requirement as they were, at least technically, citizens of Turkey at the time of the genocide.

Nevertheless, a credible argument can be made that Armenians living in Ottoman Turkey during the time of the Armenian Genocide were in a situation comparable to that of Jews living in Nazi Germany: they were subjects of that state but not its citizens. In Ottoman Turkey (a predominantly Muslim society), Christians and Jews were constrained in their rights through a system known as *dhimmitude*.²⁴⁸ A *dhimmi* (protected person) was a person who was not a Muslim, but was nonetheless protected from the *jihad* concept if they lent themselves to certain severe societal limitations.²⁴⁹ In line with this “protected” status, *dhimmis* could not bear arms, serve in the military, or openly practice any of their religious tenets, and were forced to wear certain clothing of certain color, barred from marrying Muslim women, barred from riding horses, limited in how they could build their homes and where they could live, and forced to pay a tax for “protection of the Islamic state.”²⁵⁰ The punishments for violation of any of these limitations ranged from fines to imprisonment to death.²⁵¹ One of the burgeoning reasons for the genocide itself was the non-Muslim Armenian population beginning to stir against these oppressive practices and their demand for equality in the late nineteenth and early twentieth centuries.²⁵² In that sense, the *dhimmitude* laws of Ottoman Turkey are not dissimilar to the Nuremberg laws in Nazi Germany because both denied basic civil rights of citizenship to native-born state subjects simply because of the subjects’ statuses as non-Muslims (in Ottoman Turkey) and non-Aryans (in Nazi Germany). If such legal treatment in Nazi Germany of Jews leads to removal of the citizenship requirement for the taking claims of Jewish heirs for Nazi-era theft, then a similar result can necessarily be found in the case of Armenian heirs when property was taken from their

248. BAT YE’OR, *THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM* 54–67 (1985) (explaining the concept of *dhimmi* and the results of those Christians and Jews who were subject to *dhimmitude*).

249. See James J. Reid, *Total War, the Annihilation Ethic, and the Armenian Genocide, 1870–1918*, in *THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS*, *supra* note 2, at 21, 26 (explaining that “Armenian, Greek, Nestorian, Syrian, and Coptic Christians living under Ottoman rule always held a *dhimmi* status, as did Ottoman Jews”).

250. AKÇAM, *supra* note 91, at 22–25.

251. *Id.* at 24.

252. See *id.* at 24–25.

ancestors by the Ottoman Turkish Empire and whose legal status in Ottoman Turkey was akin to that of Jews in Nazi Germany.

As such, an Armenian plaintiff has a claim similar to the plaintiff in *Cassirer* in that Armenians were not treated as citizens of Turkey during the time of the genocide, but were *dhimmis*, subservient to both the government and all Muslim citizens in almost every aspect of their daily lives. As in *Cassirer*, an Armenian plaintiff would have to bolster his or her claims with factual specifics of the terms of *dhimmitude* in Ottoman Turkey, and relate such to a conclusion that non-Muslims were not citizens, but were separate and apart from the vast Muslim majority.

C. Suing Turkey and Its State-Owned Entities

In the second half of 2010, the legal focuses were finally turned to the actual perpetrators when suits were filed in American courts against the Republic of Turkey, as successor of Ottoman Turkey, and two state-owned banks: the Central Bank of Turkey and Ziraat Bank, a state-owned commercial bank that is also the oldest bank in Turkey with origins going back to 1863.²⁵³

The two suits were filed against these sovereign entities by two different sets of lawyers. The first suit, *Davoyan v. Republic of Turkey*,²⁵⁴ was filed by plaintiff Garbis Davoyan, on behalf of beneficiaries of former Turkish citizens and their heirs, against the Turkish government whose successor is the Republic of Turkey.²⁵⁵ The suit claimed the Turkish government had deprived plaintiffs of citizenship, brutally deported the plaintiffs' ancestors, and seized and expropriated the ancestors' property.²⁵⁶ Further, the plaintiff in *Davoyan* claims that the defendant, the Republic of Turkey, is a legitimate successor of the predecessor government—the Ottoman Turkish Empire—and should be amenable to suit.²⁵⁷ As of this writing, the suit is in its initial stages, with the sovereign defendants yet to be served under the service of process provisions of FSIA.

253. For information on Ziraat Bank's New York branch, see T.C. ZIRAAT BANKASI A.Ş.: NEW YORK BRANCH, <http://www.ziraatnewyork.com/> (last visited Oct. 12, 2011).

254. Class Action Complaint and Jury Trial Demand, *Davoyan v. Republic of Turkey* ¶ 1, No. 2:10-cv-05636-DMG-SS (C.D. Cal. July 29, 2010).

255. *Id.* This suit was filed by a team of lawyers headed by Kabateck and Geragos.

256. *Id.*

257. *Id.*

The second suit, *Bakalian v. Republic of Turkey*, also at the beginning stages at the time of this writing, was filed by plaintiff Alex Bakalian and others, and seeks fair market rents and rightful ownership of some 122.5 acres of property located in the Adana region of Turkey, taken from their ancestors during the Armenian Genocide.²⁵⁸ Today, this property is occupied by the Incirlik Air Force Base, which is used by the American military for operations in Iraq and Afghanistan.²⁵⁹ The irony, of course, is that the United States is fighting wars to establish democracy and freedom in the region on land stolen during a genocide.

V. CONCLUSION

The above discussion regarding suing Turkey in American courts does not intend to create an impression that such a suit will necessarily succeed. With the various procedural defenses available to Turkey and its agencies or instrumentalities, it is quite probable that such a suit could be dismissed on one or more of such defenses. Nevertheless, when the Holocaust-era restitution suits were first filed in the late 1990s, an expert assessment of such suits would have predicted the same dismal result. With the legal precedent established by the successes of the

258. Complaint and Demand for Jury Trial ¶ 1, *Bakalian v. Republic of Turkey*, No. 2:10-cv-09596-DMG-SS (C.D. Cal. Dec. 15, 2010). This suit was filed by a team of lawyers headed by Yeghiayan.

259. For information about the Incirlik base, see U.S. AIR FORCE: INCIRLIK AIR BASE, <http://www.incirlik.af.mil/> (last visited Oct. 12, 2011). As the website explains,

Close to many of the world's potential trouble spots, Incirlik Air Base is an important base in NATO's Southern Region. The mission of the host 39th Air Base Wing is to support and protect U.S. and NATO assets and people throughout Turkey while providing a full spectrum of capabilities to the warfighter.

Welcome, U.S. AIR FORCE: INCIRLIK AIR BASE, <http://www.incirlik.af.mil/main/welcome.asp> (last visited Oct. 11, 2011). Although the 39th Air Base Wing has no permanently-assigned U.S. Air Force aircraft, it provides excellent facilities and supports various training deployments and regional exercises, serves as a key communications link for National Command Authority tasks, and provides hub support for various units. *Id.*

Interestingly, the website obliquely refers to the acts of genocide committed against the Armenians in the area: "In 1909 Adana was the site of what is termed the Adana massacre. Turkish scholars and some others refer to the event as the Adana rebellion based on a thesis of its underlying causes." *Adana, Turkey*, U.S. AIR FORCE: INCIRLIK AIR BASE (Nov. 22, 2006), <http://www.incirlik.af.mil/library/factsheets/factsheet.asp?id=5472>; see also Rouben Paul Adalian, *Adana Massacre*, in 1 *ENCYCLOPEDIA OF GENOCIDE* 47, 47 (Israel W. Charny ed., 2000) ("The Adana Massacre was the second series of large-scale massacres of Armenians to break out in the Ottoman Empire. The atrocities committed in the province of Adana . . . [resulted in] an estimated 30,000 Armenians [being] killed.").

Holocaust restitution litigation in the United States, and the decisions of the Armenian insurance and bank suits filed to date, the legal landscape for filing a suit against Turkey or one of its state-owned entities for acts arising out of the Armenian Genocide has never been more favorable.

Keeping in mind, therefore, the unpredictable nature of litigation and its possible outcome, this Article is meant both to inspire and provide proper navigational guidance for those who endeavor to set off in uncharted American legal waters with the aim of providing a measure of justice for the heirs whose ancestors were victims of the first non-colonial genocide of the modern era.